REBA NEWS

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The Newsletter of the
Real Estate Bar Association for Massachusetts

Missing discharges and assignments of mortgage: looking for a solution to a vexing problem

By Daniel J. Ossoff and Edward J. Smith

OSSOFF

SMITH

Is there any issue that vexes lawyers closing residential real estate transactions more than the missing discharge and/or assignment of mortgage that is necessary to provide clear title?

Last year, at the behest of then president-elect Chris Kehoe, REBA's Legislation Committee began an exhausting effort to construct a legislative solution to the problem. As the committee pondered the issues, and remembered the many valiant efforts of their predecessors to devise and pass legislative reforms, members often referred to their mission as "Chris' Dream."

To cite a few such statutes that had been supported and/or drafted by committee members: Chapter 533 of the Acts of 1987 authorized the use of a discharge by affidavit when other non-record evidence of satisfaction was available from a prior closing; Chapter 303 of the Acts of 1989 required that a discharge of mortgage recite the title reference for the subject mortgage, the property address and the name of the mortgagor; Chapter 410 of the Acts of1992 simplified authority requirements to establish a valid discharge, release or assignment of mortgage; and, Chapter 480 of the Acts of 1996 permitted reliance on discharges executed by certain non-record servicers and noteholders.

The introduction of MERS (Mortgage Electronic Registration System) was intended to provide a central repository of all off-record information relative to assignments and satisfaction of new mortgages, such that lenders, conveyancers and title insurers could rely upon a clearinghouse system, supported by contemporary technology, to determine the status of a mortgage lien. MERS, unfortunately, was not without its limitations.

The Legislation Committee is considering a number of new ideas, all of which have analogues or models in statutes of other states or in the recommendations of the National Conference of Commissioners on Uniform State Laws (NCCUSL). Committee member Attorney Ward P. Graham of Stewart Title Guaranty Company has contributed heroic efforts in researching other states' laws and in drafting Massachusetts proposals for the committee.

Examples From Other States

One interesting statute from Florida requires a mortgagee whose note has been paid off to execute and record a discharge of the mortgage and, within 60 days of receiving payment, to send the discharge after it has been recorded, to the person who made payment, with a civil remedy that allows for recovery of attorneys' fees and costs. (FL ST 701.04)

Florida also makes it a misdemeanor if a mortgagee fails to "cancel and satisfy of record" the mortgage, within 30 days after written demand therefor by the person who paid off the mortgage note. (FL ST 701.05) South Carolina requires such a mortgagee to forfeit a sum "not exceeding one-half of the debt secured...or $25,000, whichever is less, plus actual damages and attorneys' fees in the discretion of the court". (SC Code of Laws 29-3-310 and 29-3-320.)

Other states have lesser monetary sanctions if a mortgagee fails to deliver a written satisfaction. Some provide a recurring daily or weekly penalty up to a predetermined cap, e.g. Connecticut and Louisiana ($200 per week up to $5,000). Others impose a minor sanction upon non-complying mortgagees, e.g. Michigan (flat charge of $500). [Source: The Legal Description, 05/22/03.]

The misdemeanor penalty in Florida and South Carolina's heavy forfeiture amount are perhaps draconian in nature. However the fact that there has been so much "experimen-

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Dan Ossoff is the Association's President-Elect and practices with Rackemann, Sawyer & Brewster. Ed Smith is the Association's Legislative Counsel. He practices in Boston.

MCA is now the Real Estate Bar Association for Massachusetts

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). And this launch issue of REBA News is the quarterly publication beginning a new chapter in the Association's long and honorable history of service to the real estate bar.

The new name and the launch of this new quarterly publication are the final steps in a three-year "re-branding" process begun in 2000 when the Association's leadership embraced a strategic plan for growth.

The new name and publication 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…

Land Court moves to new quarters in Boston

Photo by Lynne Berger

New location on Causeway St. in Boston

On Dec. 8, 2003, the Land Court Department of the Massachusetts Trial Court opened for business at its new location at 226 Causeway Street in Boston. All offices, including the courtrooms, of the Land Court are housed in the newly renovated building on Causeway Street, which is located at the intersection of Causeway and North Washington streets.

The entrance to the building faces the Fleet Center. The business hours of the Land Court are 8:30 am to 5:00 pm.

The Land Court's telephone and facsimile numbers have remained the same. The new mailing address is: 226 Causeway Street, Boston, MA 02114.

The Land Court relocation, which was conducted by the Administrative Office of the Trial Court in cooperation with the Commonwealth's Division of Capital Asset Management, will enable the Boston Municipal Court to move to the Brooke Courthouse in 2004 from its present location at the John W. McCormack Courthouse on Devonshire Street when the Trial Court lease expires at the McCormack Courthouse in 2005.

Reminder on deductibility of dues

REBA (formerly MCA) members are reminded that they cannot deduct as a business expense that portion of membership dues used for lobbying purposes (IRC Section 162(e)). REBA has allocated 10 percent of annual dues to its lobbying activities in 2003.

REBA elects officers and directors

KEHOE
President

OSSOFF
President-Elect

SMITH
Clerk

MORIARTY
Treasurer

At its Annual Meeting held on Monday, Nov. 3, 2003 at the Sheraton Framingham Hotel, The Real Estate Bar Association for Massachusetts elected attorneys E. Christopher Kehoe as President and Daniel J. Ossoff as President- Elect for the 2004 term. Virginia Stanton Smith was re-elected Clerk and Robert J. Moriarty, Jr. was elected Treasurer.

A partner in the Boston office of the Hartford-based law firm Robinson & Cole, Kehoe's practice emphasizes real estate and finance law and the representation of national and local developers and lenders in the acquisition, financing and development of a variety of projects including condominium construction and conversation, residential subdivisions and shopping centers. He is a member of the American Land Title Association (ALTA) and the real estate sections of the American Bar Association (ABA), the Boston Bar Association (BBA) and the Massachusetts Bar Association (MBA).

He received is BA, *cum laude,* from St. Anselm College and his JD from Boston College Law School. He resides with his wife, Barbara, and children, Christin and Kerin, in Hingham.

Daniel J. Ossoff chairs the real estate practice group of the Boston law firm of Rackemann, Sawyer & Brewster. His practice concentrates on all aspects of commercial real estate development and finance with an emphasis on land acquisition and disposition, leasing, title and land use planning matters. Ossoff represents national corporations, non-profit institutions, private developers institutional lenders and governmental agencies in a wide variety of commercial real estate projects. He received his BA, *summa cum laude,* from Colby College and his JD, *cum laude,* from Harvard Law School.

Virginia Stanton Smith is a partner in the Berkshire County firm of Grinnell, Dubendorf & Smith. Her practice includes estate planning, estate administration and all aspects of real estate. She has represented real estate developers in commercial projects, including the acquisition, financing, development, zoning and leasing. Smith is active in Berkshire County's philanthropic community, serving as president of the Berkshire Fund, an affordable housing group. Her other affiliations include Hancock Shaker Village and the Berkshire Medical Center. She received her AB from Franklin & Marshall College and her JD from Boston College Law School.

A founding partner of the Boston-based law firm of Marsh, Moriarty, Ontell & Golder, Robert Moriarty received his undergraduate degree from Boston College and his law degree from the University of Connecticut. He concentrates in commercial and residential title matters including the review of title abstracts, title reports, title insurance commitments, title certifications, title insurance policies and the resolution of title issues on behalf of title insurance underwriters, law firm clients, developer clients and institutional lenders. A resident of Topsfield, he currently chairs the Topsfield Board of Appeals.

It's time to Re-Member your REBA membership for 2004 !!

REBA News is an official publication of the Real Estate Bar Association for Massachusetts.

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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.

Web Address
www.massrelaw.org
Username: rebamember
Password: sizzle

From the President's desk

By E. Christopher Kehoe

I am always excited by the energy that accompanies a new year. In 2004 the Real Estate Bar Association of Massachusetts must harness the energy of our dedicated Board of Directors and staff to implement our agenda for this year. We also welcome the energy that is generated by you, our members, to focus us in the year ahead.

As our strategic plan enters its third year, you will see more changes. One of the most apparent is that your newsletter is now published by Massachusetts Lawyers Weekly. Although the name of the newsletter has changed, you will find the same quality content that you have come to expect. Our thanks to Scott Ziegler and Jeff Baskies from Lawyers Weekly for partnering with us to dramatically increase our exposure by reaching every Lawyers Weekly reader, in addition to over 3,000 members of REBA.

Also, to implement the strategic plan adopted three years ago, we have "re-branded" the Association and formally changed our name to the Real Estate Bar Association for Massachusetts ("REBA"). This change was made only after long deliberations by your Board of Directors. This new name will increase the strength of the Association by enhancing its relevance to all real estate lawyers as we reach out to those beyond title-related fields.

Other initiatives this year include those of our Legislative Committee chaired by our new Director, Robert Kelley. He will work closely with Edward J. Smith, our Legislative Counsel, to review and, when appropriate, respond, to any proposed legislation affecting real estate practice in Massachusetts.

Additionally, REBA has proposed important legislation in 2004. The Omnibus Real Estate Mortgage Discharge Bill, which was only a dream in 2003, is making its way through the legislative process. This important legislation is detailed in Ed Smith's column, elsewhere in REBA News. I urge you to read it and offer Bob Kelley your comments. When the time comes for a vote of the Legislature on this important bill, we will seek your support.

In addition to welcoming Bob Kelley to the Board, I would like to welcome three additional new Board Members: David Hellman from Great Barrington, Cerise Jalelian from Wakefield and Craig Martin from Taunton. We look forward to the new ideas and geographic diversity that they bring to the Association.

I would also like to welcome back Jon Davis and Joel Stein to the Board, after a brief hiatus as Directors Emeriti. Jon Davis once again chairs the important Committee on the Practice of Law by Non-Lawyers. Jon's enthusiasm and zeal are infectious in this critical area and I know that he has a strong agenda in 2004. Joel Stein again chairs the Title Insurance and National Affairs Committee and we all look forward to the experience and considered perspective that he brings to issues that affect every one of us.

Another central component of our strategic plan has been to increase the responsibility of REBA's staff for the day-to-day activities of the organization. I congratulate Peter Wittenborg on completing his first year as Executive Director of REBA. Under his steady hand our organization has grown by over 500 members in the last year. As REBA continues to grow, its effectiveness for its members will increase. The vision of your Board, which Peter helps implement on a daily basis, is to make REBA the strongest and best real estate bar association in the country.

Sharin Paaso has been busy in the last several months, as she focuses on making REBA Dispute Resolution the forum of choice to mediate real estate disputes. Please consider language in your Purchase and Sale Agreements making REBA Dispute Resolution the parties' choice in the event of a dispute.

Part of the mission of REBA has always been to keep our members current on trends in real estate law. To that end, we hope to reach out to other professional associations in the coming months with the idea of jointly sponsoring educational programs that will benefit you, our members.

Pamela Butler O'Brien, chair of our Continuing Education Committee, has some great ideas for seminars that we can all look forward to at our May and November meetings. Incidentally, our meeting last November was among the best-attended meetings the Association has ever hosted and the response we have received on the programs offered was overwhelmingly enthusiastic. We recognize that the Framingham location has seemed crowded at the last couple of meetings and we are seeking alternative sites that will allow us to enjoy these meetings in a more relaxed and comfortable atmosphere. Look for a new venue in November 2004.

As many of you may be aware, REBA's expanded new headquarters is now located at 50 Congress Street, Suite 600, in Boston. If you need space to conduct a closing or a meeting in Boston, contact REBA's Administrative Assistant, Pam Carini to reserve a conference room. The new space also affords us enough room to conduct more mediations on site in an attractive and professional setting.

The Real Estate Bar Association for Massachusetts has much to accomplish in 2004. Given the vision and dedication of our committed Board of Directors and the enthusiasm of our staff, I am confident that we will serve you well. Thank you for the opportunity.

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!

May 10th REBA 2004 Spring Seminar
Sheraton Framingham Hotel

EXECUTIVE ORDER NO. 455

Governor issues standards of conduct for notaries

(Editor's note: The following is an executive order issued by Gov. Mitt Romney on Dec. 19, 2003, which outlines the standards of conduct for notaries public.)

By His Excellency
MITT ROMNEY
GOVERNOR
EXECUTIVE ORDER
NO. 455 (03-13)

STANDARDS OF CONDUCT FOR NOTARIES PUBLIC

WHEREAS, notaries public promote, serve, and protect the public interest by acting as independent witnesses in a variety of situations;

WHEREAS, notaries public currently lack specific guidance as to the nature and scope of their duties;

WHEREAS, it is important to foster ethical conduct among notaries public;

NOW, THEREFORE, I, Mitt Romney, Governor of the Commonwealth, by virtue of the authority vested in me as Supreme Executive Magistrate, Part 2, c. 2, § I, Art. I, do hereby order as follows:

Section 1: Applicability.

(a) This executive order shall apply to all notaries public, including notaries public who received their commission before the effective date of this executive order.

(b) All notaries public who receive their commission after the date of this Executive Order shall immediately comply with all of its provisions.

(c) All notaries public who received their commissions before the date of this Executive Order shall have 60 days to comply with all of its provisions.

Section 2: Definitions.

As used in this executive order and set forth in bold for ease of reference, the following words shall have the following meanings:

"**Acknowledgment**" shall mean a notarial act in which an individual, at a single time and place:

(a) appears in person before the notary public and presents a document;

(b) is identified by the notary public through

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FAQs provided by governor to clarify notaries Executive Order

FREQUENTLY ASKED QUESTIONS AND CLARIFICATIONS EXECUTIVE ORDER 455 (03-13)

Where can I get a copy of the Governor's new Executive Order?

www.lawlib.state.ma.us/ExecOrders/eo455.doc

When does it become effective?

The Governor signed the Executive Order on December 19, 2003. It became effective immediately, and states that notaries public would have 60 days to comply with the provisions of the Executive Order. We have received comments that some additional time would be useful. Accordingly, all notaries have until April 19, 2004 to comply with the Executive Order.

What is the purpose of the Executive Order?

Until now, there has been virtually no guidance for notaries public about what to do and how to do it. The Executive Order provides that information. In addition, there have been no safeguards in place to help prevent fraud, forgeries, and other misconduct by a small but significant number of notaries. The Executive Order provides notice to notaries as to what behavior constitutes misconduct, and then allows the Governor to decline to re-appoint or remove the commission from notaries who are engaging in misconduct.

Does the Executive Order change any statutes?

No. If there is a statutory requirement in place, the Executive Order does not change that requirement. For example, if a statute requires a certain type of certification for a document to be self-authenticating, the Executive Order does not change the requirements of that statute.

Do I have to get a new stamp or seal?

Notaries must have and use a stamp

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REBA Membership Application

☐ **New 2004 Membership** ☐ **Renewal of Existing Membership for 2004** ☐ **Change of Address/ Telephone/Fax Only**

NAME: _____

FIRM: _____

ADDRESS: _____

CITY/TOWN: _____ COUNTY: _____ STATE: _____ ZIP: _____

TELEPHONE: _____ FAX: _____

E-MAIL: _____

Check Membership Category:

☐ $ 195 Voting Member (Attorneys admitted to Massachusetts Bar)
Year Admitted to the Massachusetts Bar _____ And BBO#_____

☐ $ 125 Voting Member (Attorneys admitted to Mass Bar w/i last 3 years)
Year Admitted to the Massachusetts Bar _____ And BBO#_____

☐ $ 195 Subscriber
Profession: Paralegal, Librarian, Title Examiner, Surveyor, Other:_____

☐ $ 75 Full-time Law Student
(Include photocopy of current student ID card.)

☐ $ 10 Optional: Imprinted 3-ring binder.
Large enough to hold all of the REBA Standards & Forms

_____ Enclosed is my check for $ _____

_____ Please charge my _____ Master Card _____ Visa for $ _____

Card No: _____

Expiration Date:_____ Signature:_____

Please send this completed application with appropriate fee to:
Real Estate Bar Association for Massachusetts
50 Congress Street, Suite 600
Boston, Massachusetts 02109-4075
Tel: (617) 854-7555 or (800) 496-6799 Fax: (617) 854-7570

Impact of new Massachusetts Business Corporations Act on real estate law: A primer

By Robert H. Kelley

On Nov. 26, 2003, Gov. Mitt Romney approved Chapter 127 of the Acts of 2003, which is commonly known as the Massachusetts Business Corporations Act (the "Act").

The Act becomes effective on July 1, 2004, and the full text of the Act may be found at http://www.state.ma.us/ legis/laws/seslaw03/sl030127.htm.

The Act is based on the Model Business Corporation Act that was drafted by the American Bar Association Section of Business Law's Committee on Corporate Law. The Act aligns Massachusetts law with U.S. majority law as most states already have based their business corporations laws on the ABA Model Business Corporation Act.

This article will discuss provisions of the Massachusetts Business Corporations Act that are relevant to the practice of real estate law.

The relevant provisions of the Act can be placed in the following main categories: requirements for completing documents to be filed with the Office of the Secretary of the Commonwealth (the "Secretary's Office"); provisions stating when documents filed with the Secretary's Office become effective; provisions describing allowable corporate powers; and, requirements for filing documents with the Secretary's Office or with the appropriate registry of deeds in respect of corporate reorganizations, mergers, consolidations, etc.

Bob Kelley is a member of the Association's Board of Directors and chairs the Legislation Committee. 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 national law firm headquartered in Baltimore.

Requirements for Completing Documents Filed with Secretary's Office

In general, in order to be eligible for filing with the Secretary's Office, a document must be executed by the chairman of the board of directors, by the president or another officer or by a court-appointed fiduciary such as a trustee or receiver. In addition to a signature, a person executing a document must state his or her name and the capacity in which the document was signed. A document may, but is not required to, contain a corporate seal or any attestation, acknowledgment or verification. In most cases, a filing must consist of one original document and one exact or conformed copy of the original document. Electronic filings are allowed to the extent permitted by the Secretary's Office and pursuant to any regulations promulgated by the Secretary's Office (which regulations will supersede any inconsistent provisions of the Act regarding electronic filings).

Regarding documents affecting real estate, Section 8.46 of the Act provides that: "Any recordable instrument purporting to affect an interest in real estate, executed in the name of a corporation by the president or a vice president and the treasurer or an assistant treasurer, who may be one and the same person, shall be binding on the corporation in favor of a purchaser or other person relying in good faith on the instrument notwithstanding any inconsistent provisions of the articles of organization or bylaws of the corporation, any special act of incorporation governing the corporation or any vote or other action by the shareholders or directors of the corporation."

Provisions on when Documents Filed with Secretary's Office Become Effective

Section 1.23 of the Act provides: "(a) Except as provided in subsection (b) and in

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Reforming the Massachusetts Homestead Act

By Robert J. Moriarty Jr.

Homestead Act: Important Law to Protect Family but in Need of Reform was the title of an article written for the Massachusetts Law Review more than 20 years ago *(1980 65 Mass. L. Rev. 175)*.

Today, in 2004, the title is truer than when originally written. Homestead has become an even more important tool in protecting the families of Massachusetts, yet it is today in even greater need of total reform than in 1980.

The Real Estate Bar Association for Massachusetts (REBA) has embraced reform of M.G.L. c. 188, the Homestead Act, as a legislative priority this year.

A brief examination of the legislative history of the Homestead Act discloses that it was originally enacted in 1851, St. 1851, c. 340, §§ 1 and 4. Life in the Commonwealth was very different then. We were still a largely agrarian society with industrialization only beginning in a few cities and larger towns. The goal of the legislature at that time was to protect householders from forfeiting the homestead portion of the family farm and therefore to serve as a source of con-

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Bob Moriarty is the 2004 Treasurer of the Real Estate Bar Association having served from 1998 through 2003 as chair of the Association's Title Standards Committee. He is a founding partner of Marsh, Moriarty, Ontell & Golder, PC.

Update on Massachusetts Land Court

By Hon. Karyn F. Scheier

Following a challenging weekend in which we battled the season's first snowstorm, the Land Court opened for business on Dec. 8, 2003, at its new location at 226 Causeway Street, Boston, MA 02114. The court's former post office box number should not be used, as the box has been closed. All of our telephone and fax numbers remain the same.

The court is located on Floors 2 and 3 of the commercial building known as The Causeway, located at the corner of Causeway and North Washington Streets. While we are still working out the kinks, court personnel are pleased with the new location and think it will serve us and the public well.

All of the registration plans and case files that were formerly located at the Brooke Courthouse have been moved and are available at Causeway Street. Our space has been fit up with four courtrooms, all of which are equipped with a state-of-the-art recording system and have adjacent conference rooms for use by lawyers and litigants.

Hours of the Recorder's Office, on the second floor, remain the same at 8:30am to 5:00pm. We have heard from many lawyers that the new location is a bit out

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Judge Scheier has been on the Land Court since 1994. She became Chief Justice in 2003.

Title insurance: A primer for homeowners

By Peter Wittenborg

The title insurance industry plays a critical role in the U.S. economy by facilitating the growth of the secondary mortgage market, thus enabling Americans to have a rate of home ownership that is among the highest in the world.

The process of insuring the proper transfer of real estate from seller to buyer is critical to the real estate transfer process.

Abstractors, lawyers, title insurance agents and title insurance companies, sometimes called "underwriters", accomplish this process.

At any real estate closing the parties must be assured that the title of the subject real property is as represented and expected. Title insurance brings confidence and certainty to real estate transactions.

The functions of search and examination

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Peter Wittenborg serves as Executive Director of REBA. Prior to joining the REBA staff in 2002 he practiced real estate law in Boston.

Title insurance underwriters' Massachusetts market share

2003 was a very, very good year for the title insurance industry nationwide and Massachusetts was no exception. Total aggregate premiums for all underwriters in Massachusetts for the first nine months of 2003 was over $257 million.

For the same nine-month period in 2002 the total industry aggregate premiums were just under $175 million.

First American, the market leader here, led the pack with a 40 percent market share. The Fidelity family of underwriters, including Fidelity National and Chicago Title, followed with 19.4 percent of the market. The LandAmerica group, including Commonwealth and Lawyers Title, held an 18.6 percent market share. Old Republic followed with 10.9 percent and Stewart with 7.7 percent.

Market newcomer, CATIC (Connecticut Attorneys Title Insurance Company), a Bar-Related title insurer that is New England-based, grew to 2.5 percent market share in the first nine months of 2003.

Flexible reading of the Mass. condominium statute

By Saul J. Feldman

The Supreme Judicial Court in a recent case stated that the Massachusetts Condominium Statute, M.G.L., c. 183A, is to be interpreted in a flexible manner rather than in a restrictive manner.

The opinion, *Queler v. Skowron*, 438 Mass. 304, seems to reverse a long line of cases which held that Chapter 183A was a very restrictive statute, meaning that, prior to this case, what was not specifically permitted under Chapter 183A was prohibited.

The SJC in *Queler* stated that "General Laws, Chapter 183A, is essentially an enabling statute, setting out a framework for the development of condominiums in the Commonwealth, while providing developers and unit owners with planning flexibility."

This allows condominium lawyers and developers the chance to be creative again.

Convertible Common Areas

An example should be the concept of convertible common areas.

Developers of a multi-unit building often want to start conveying condominium units before the construction is completed.

The requirement of Chapter 183A – that "as built" plans of the units be recorded with the Master Deed – presents a problem. Under Section 8(f) of Chapter 183A, the Master Deed cannot be recorded without a set of "as built" floor plans. Section 8(f) states that the floor plans must bear "the verified statement of a registered architect, registered professional engineer, or registered land surveyor, certifying that the plans fully and accurately depict the layout, location, unit numbers and dimensions of the units, as built."

The plans cannot show the anticipated

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Saul J. Feldman is a real estate attorney in Boston. This article previously appeared in the New England Real Estate Journal.

Power of attorney at a closing: what are the standards?

By Virginia Stanton Smith

Those of us who handle residential conveyances have simply resigned ourselves to the tremendous proliferation in paperwork that accompanies the typical house closing. And so many of us have barely noticed that the Power of Attorney form given by a client to her lawyer has become commonplace.

When the lawyer is to sign a deed, mortgage or other recordable document, the Power of Attorney is clearly appropriate to keep the record title clear – but is the written Power of Attorney really necessary when the lawyer will only be signing off record documents? Do we not have the authority, as lawyers, to sign on behalf of our clients in a representative capacity?

Those questions have been considered by the REBA Practice Standards Committee and by the REBA Board of Directors.

We can't agree on whether we should have a Practice Standard governing the use of Powers of Attorney and if so, what it should say. And so, we have no Practice Standard on the subject. Still, it's worth considering the arguments on both sides.

Are we not serving as agent for our client, as attorney-at-law, and therefore appropriately treated differently from the Seller's brother-in-law who clearly *does* need a written Power of Attorney? Many real estate lawyers routinely sign agreements to extend the inspection contingency deadline, or the closing date on behalf of their clients. Why should signing the HUD-1 or the title insurance affidavit be any different? We are professionals, and our professionalism may be more evident and better served when we exempt ourselves from the documented Power of Attorney requirement.

Or is it a requirement? Who requires clos-

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Virginia Smith is chair of the REBA Practice Standards Committee. She is a partner with Grinnell, Dubendorf & Smith in Pittsfield.

Real property interests could be extinguished by bankruptcy sale

By Edward M. Bloom and Michael J. Goldberg

BLOOM

GOLDBERG

A recent case from the Seventh Circuit Court of Appeals has caused a significant stir in the real estate bar.

The case is *Precision Industries, Inc. v. Qualitech Steel SBQ, LLC (In re Qualitech Steel Corporation)*, 327 F.3d 537 (7th Cir. 2003) and it seems to stand for the proposition that a sale "free and clear of liens and interests," as provided for by Section 363(f) of the Bankruptcy Code, can wipe out a wide range of real property interests, traditionally thought by real estate lawyers to be inviolate. While that characterization of the *Precision* decision is far too sweeping, the opinion has very significant implications for tenants and other holders of interests in real property and important lessons for how such parties should protect their interests in bankruptcy proceedings.

Ed Bloom is chair of REBA's Leasing Committee and is a partner at Sherin and Lodgen LLP where he practices in the Real Estate Department. Michael Goldberg is Of Counsel at Sherin and Lodgen LLP and is the co-chair of the Firm's Bankruptcy and Creditors Rights Practice Group.

Bankruptcy Basics

Under Section 363(f) of the Bankruptcy Code, debtors-in-possession and trustees are permitted to sell property "free and clear of liens and interests." Although this power has traditionally been used to permit a trustee to sell property free and clear of monetary encumbrances, the statute has, in recent years, seen far broader use.

For example, it has been used to prohibit the holders of general unsecured claims against the selling debtor from bringing successor liability claims against the purchaser of the debtor's business assets. *See, e.g.*, *Trans World Airlines, Inc. v. EEOC*, 322 F.3d 283 (3rd Cir. 2003).

Section 363(f) provides that property may be sold free and clear of the interests of another entity in such property under one of the following five circumstances: applicable non-bankruptcy law permits sale of such property free and clear of such interest; such entity consents; such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; such interest is in bona fide dispute; or such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.11 U.S.C. §363(f)(1)-(5).

Typically, the liens and security interests of the holders of interests in the assets to be sold attach to the sale proceeds paid to the debtor's estate in the order of their priority in the property sold, thereby providing "adequate protection" to the holders of such interests pending the distribution of sale proceeds. 11 U.S.C. §363(e).

The *Precision* ruling was unusual because it required the Court to apply Section 363(f) to interests in property arising under another section of the Bankruptcy Code. In the case, the debtor Qualitech Steel proposed to sell real property – on which it operated a steel mill – which was also subject to a 10-year lease to Precision Industries (which operated a supply warehouse at the site).

During the negotiations for the sale, even after a motion seeking approval of the sale "free and clear" of interests was filed, Precision and the buyer were engaged in discussions over a possible assumption and amendment of the lease between Precision and Qualitech, and its ultimate assignment to the buyer.

However, those negotiations did not result in an agreement, and, at the sale hearing, there was no provision for an assignment of the lease to the buyer. Precision, however, did not object to the proposed sale "free and clear of liens and interests." Eventually, the discussions between Precision and the buyer terminated without agreement and Qualitech sought to reject its lease with Precision.

At this point in the analysis, another Bankruptcy Code provision comes into play. Section 365(h) protects a tenant when its landlord has declared bankruptcy. The statute provides that, upon rejection of a lease by the landlord, the tenant has two choices: either treat the lease as terminated or remain in possession of the leased premises, retaining all of the basic rights of the tenant (rental rate, rights of use and possession, assignment and subletting rights) set forth in the lease for its

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Proposed HUD RESPA reforms update

By Joel A. Stein

Since its inception in 1974, there have been a series of minor revisions to the Real Estate Settlement Procedures Act (RESPA). The law was originally enacted to govern the closing process by requiring the disclosure of closing costs, escrow practices and relationships between closing service providers.

RESPA covers mortgage loans on one-to-four family residential transactions, including loans, refinances, equity loans, and second mortgages.

In July 29, 2002, following the issuance of a Homebuyers' Bill of Rights by Housing and Urban Development Secretary Mel Martinez, a proposal was published in the Federal Register. The proposal included a 90-day comment period.

The proposal included the following provisions: alteration of the way lender payments to brokers are recorded requiring additional disclosure of mortgage broker/loan originator compensation; revision of HUD's Good Faith Estimate Settlement disclosure; and, creation of guaranteed mortgage packages which would exempt such packages from the referral fee and fee-splitting provisions of Section 8 of RESPA.

Through the 90-day comment period, HUD received thousands of comments from Lenders, Brokers, and Settlement Service Providers. It was originally expected that HUD would issue a final version of the Rule in the fall of 2003.

In a previous issue of the Association's quarterly print newsletter (Vol. 21:1 *The Conveyancer*) published in Winter 2002, I discussed the first of these three provisions concerning lender payments to mortgage brokers. For the purposes of this article, I will concentrate on the latter two of these provisions, being the revision to the Good Faith Estimate (GFE) disclosure and mechanics of "bundling" or providing guaranteed mortgage packages.

The Revision Of the GFE Disclosure

The proposed Good Faith Estimate provisions would provide consumers with additional information that could place substantial pressure on loan originators to meet the charges stated on the GFE. The estimate must be valid for at least 30 days and the borrower may request a new GFE after that time has passed.

The GFE revision further establishes a tolerance range of 10 percent for certain settlement charge categories which include the "shoppable" lender-required third-party services, borrow-selected title services, insurance if the borrower selects a provider identified by the loan originator and reserve/escrow deposits. The tolerance range does not apply to third-party services that the borrower selects independently. However, fees for lender-selected title services and insurance must not vary at all from those described on the GFE.

The rule imposes a GFE re-disclosure requirement to address a change in circumstances. If after the completion of underwriting, it is determined that the borrower does not qualify for the loan product, the loan originator must inform the borrower that the originator does not offer products meeting such circumstances, or in the alternative, if the originator does offer such products, the originator must advise the borrower of that fact and the borrower may request a new GFE.

The rule will revise the GFE to include the interest rate, annual percentage rate, and loan amount, any mortgage insurance premium included in the APR, information on adjustments to interest rates in adjustable rate mortgages, pre-payment penalties and balloon payments as well as the disclaimer that unless the borrower locks in the interest rate, the interest rate may change.

It will revise the GFE to identify separate services that are required or selected by the lender and other third-party services that are required above for which borrowers can shop among providers on their own. The proposed GFE will also include a breakdown of origination charges to the lender and the broker and a breakdown of title insurance and title agent compensation.

The borrower will receive the GFE upon providing a loan originator sufficient information whether orally, in writing, or by computer to enable the loan originator to make a preliminary credit decision. The borrower will get the GFE before payment of any significant fee.

The fees paid by the borrower for the GFE should be only that amount necessary for the originator to provide the GFE itself.

The above revisions to the GFE will place a substantial burden upon the lender, particularly in estimating settlement charges within the 10 percent tolerance range, providing required disclosures, and meeting the re-disclosure requirement.

For the conveyancer, the preamble to the title insurance and title agent compensation provides that the GFE will "breakout title agent services and title insurance into sepa-

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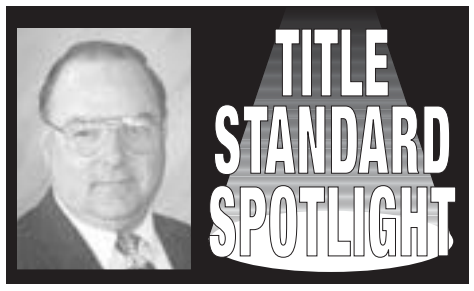
Joel Stein practices in Braintree with Friedman & Stein, PC. He is a former Association president and currently chair's REBA's Title Insurance and National Affairs Committee.

Mass. estate tax liens affecting inadequate transfers: A primer

By Ward P. Graham



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

Ward Graham is Region Counsel for New England for Stewart Title Guaranty Company in Boston and a long-time member of the Association's Title Standards Committee. This article originally appeared in The Massachusetts Focus, Vol 1: 1, Spring 2002. It is reprinted with permission.

Title Standard No. 61 (Massachusetts Estate Tax Liens With Respect To Transfers For Inadequate Consideration) is derived from the revision to M.G.L. c. 65C, §14, accomplished by St. 1985, c. 711, § 15, which essentially eliminated the so-called "transfers in contemplation of death" rule.

Inasmuch as the Massachusetts Gross Estate has been, with certain exceptions, based upon the Federal Gross Estate under the Internal Revenue Code ("IRC"), (see, M.G.L. c. 65C, §§ 1(d) and 1(f)), the contemplation of death rule was initially derived from the provisions of IRC Section 2035, entitled "Adjustments for certain gifts made within 3 years of decedent's death."

Massachusetts, however, created its own definition of the contemplation of death rule as follows: "[N]otwithstanding [IRC § 2035], the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer, relinquished a power, or exercised or released a general power of appointment, except in case of a bona fide sale for an adequate and full consideration in money or money's worth, by trust or otherwise, during the three year period ending with the date of the decedent's death; provided, however, that the value of such property or interest therein so transferred or subject to the power so relinquished, exercised or released exceeds ten thousand dollars for any person during a calendar year." M.G.L. c. 65C, §1(d) (1).

In other words, the value of any property of a decedent transferred for no or nominal consideration (a gift) within three years prior to his or her death was brought back into the Massachusetts Gross Estate even though the property was not owned by the decedent at the time of the decedent's death nor had the decedent retained any legally recognizable interest in the property until death. Nonetheless, being part of the Gross Estate, such property was subject to the Massachusetts Estate Tax Lien created under M.G.L. c. 65C, § 14.[1]

The effect this "transfers-in-contemplation-of-death" rule had on conveyancers and title examiners was to require that the title to such property be run out for nominal consideration transferor in the grantor indices and in the Probate indices to see if there was any evidence of the transferor dying within three years from the transfer, thereby triggering the application of the Estate Tax provisions to the transferred property.

The problem was that there was always the possibility that the transferor may have died in another county or state and no record of the death may have been found in the county in which the property was located so one would never know if the property was subject to the Estate Tax provisions.

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Now is the time to advertise . . . and REBA can help!

By Sami S. Baghdady

With the spring home-buying season fast approaching, now is the ideal time for real estate lawyers to advertise in their local community.

Advertising is a powerful medium, which, if done properly, offers many benefits. And advertising need not be expensive to be effective.

For example, placing an ad in a program booklet to support the fund-raising efforts of a charitable organization provides positive exposure and goodwill among other supporters of the charity. An ad in your community newspaper is an inexpensive way to gain public exposure and recognition for your real estate practice.

Another goal of advertising, to which REBA is firmly committed, is to educate the public about the important role of a lawyer in the home-buying process. Unfortunately, many consumers believe that buying a house or condominium is a simple process with little risk. As a result, some consumers engage an attorney late in the home-buying process, or only for a limited purpose, such as reviewing the purchase and sale agreement. Still others, ignorant of the risks involved, do not engage an attorney at all.

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

REBA, through its Membership & Public Relations Committee, has developed a series of advertisements that target the first-time homebuyer. These ads convey the message that buying a home is a serious matter, real estate law is a specialty, and that the real estate lawyer will protect the homebuyer's interests. The ads educate the consumer about the important role of the real estate attorney in the home-buying process. They are also lightly humorous, to avoid appearing self-serving.

In addition to running its advertisements over the past several years in The Boston Globe, The Boston Herald and many community newspapers, REBA has also adapted its advertisements for use by individual members.

REBA's Co-operative Advertising Program is a powerful benefit offered to members, permitting them to promote their real estate practice while increasing the public's perception on the benefits of using a lawyer when buying a home.

REBA supplies the ads to members at no cost and in a "camera-ready" format, with space for insertion of your firm's name,

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Software and technology survey shows conveyancers fairly tech savvy

By Michael P. Krone

In late 2003, the Association's Technology Committee undertook the task of surveying the REBA members on their use of technology. The Committee sought to determine what software the members were using to complete real estate transactions and what they thought of it.

The results were fairly consistent with a similar survey completed several years earlier with some significant changes. Most real estate lawyers use some form of software to assist them in conducting real estate closings. The operating systems and hardware they use are consistent with the business market generally.

While it has been widely reported that lawyers have been slow to embrace the Internet, we found that many more of our members were connected to the Internet through a high-speed connection, such as DSL or broadband, than we had initially expected.

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 on real estate and legal technology issues.

With over 250 responses the results were fairly representative. Some of the most interesting statistics indicated that almost 90 percent of those surveyed used some form of real estate settlement software with approximately 50 percent of those having that software connected through an office network.

Almost 95 percent used a Microsoft operating system with a few holdouts still operating with Macs. In over 60 percent of the offices surveyed there was a high-speed Internet connection although it was not, in most cases, connected to every desktop. Most had software that would permit them to electronically print conveyancing escrow account checks and reconcile their account but many did not use it, instead opting for conventional accounting programs such as Quicken.

Overall, most of the respondents were satisfied with their conveyancing software but not with the service they received from the software providers.

They were unhappy with response times, the expertise of those responding to their calls and the general "take it or leave it" attitude of the conveyancing

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The electronic future of the registry of deeds

By Richard P. Howe Jr.

Now that the breakneck pace of our most recent refinancing boom has slowed, real estate professionals should take a closer look at the technological changes at the local registry of deeds and consider their implications.

New, standardized computer systems, instantly updated websites and the recently enacted Uniform Electronic Transfer Act that will usher in electronic recording are revolutionizing the services that the Commonwealth's registries of deeds provide to their customers.

Although every registry performs the same mission, no two registries operate exactly the same way. That said, examining the changes that have occurred at one registry – Middlesex North in Lowell – will help illustrate what is happening throughout the state.

The financial problems that proved terminal to Middlesex County in 1997 had stymied any attempt to upgrade the registry's outdated and unreliable computer system. Having been absorbed into Secretary of the Commonwealth William Galvin's office after the abolition of county government, Middlesex North took full advantage of the money that the state's booming economy and concerns about the Y2K problem made available in 1999.

Register Richard P. Howe Jr.

Preparing for Y2K confirmed that the Wang computer systems in Lowell, Cambridge, Greenfield, and Worcester and the Digital system in Northampton were in dire need of replacement. Since the rapidly approaching millennium precluded a total system replacement by Jan.1, 2000, the Wang software was patched, but the old hardware was completely replaced with the Windows-based computers, servers, scanners, printers, cabling and communications required by a replacement system, solving our Y2K problem and creating a solid foundation for the future system.

Once the millennial barrier was breached, months of proposals, vendor demonstrations, user surveys and site visits led to the selection of Affiliated Computer Services (ACS) to provide the standard computer replacement system for the Commonwealth's registries. Lowell converted to ACS in July 2002, followed by Greenfield, Northampton, Worcester and Cambridge (January 2004).

ACS System 'Works Well'

The ACS system has worked very well. Its design is logical and efficient, allowing the registry to enter all data at the recording counter and the customer to walk away with a receipt bearing the book, page and instrument number and time of recording of the newly filed document. The other steps in the process – scanning and data verification – closely follow, allowing document images to appear on the registry's computers within hours of recording.

Internet access to registry records has been a great convenience for customers. By visiting the Middlesex North website, www.lowelldeeds.com, anyone can access everything on the registry's computer from the home or office at anytime. Because the website is instantly updated, its information always duplicates that at the registry.

Since the value of the registry website increases in conjunction with the amount of data available on it, the goal at Middlesex North is to have the images of all documents and all indexes available over the Internet. Presently, all 4 million pages recorded since 1950 are available. Although the 53 years of images now on the system seem dwarfed by the 320 years worth that remain, our predecessors were much more economical with paper: 90 percent of all documents

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Dick Howe is an attorney and the register at the Middlesex North Registry of Deeds In Lowell.

Status report on pending bills in the Massachusetts Legislature (2003-2004)

(The following was prepared by Daniel J. Ossoff, chairman, REBA Legislation Committee and Edward J. Smith, REBA legislative counsel.)

Through REBA's Legislation Committee and Board of Directors a significant number of pending bills are reviewed and positions taken on behalf of REBA. Technical advice is also made available to the Massachusetts House and Senate from time to time.

For copies of legislation visit the Legislature's website: www.state.ma.us/legis

Priority List

S. 6 Makes execution authority requirements for subordination of mortgage parallel with those for assignment or discharge of mortgage. Status: Joint Committee on Banks and Banking recommended ought to pass; Senate Committee on Bills in Third Reading. (REBA position: support)

S. 118 Requires expanded disclosures by sellers of residential property and exonerates brokers and lenders from liability in the absence of actual knowledge. Status: Joint Committee on Commerce & Labor. (REBA position: oppose)

S. 960 Requires a recital of the names and addresses of owners of land taken by eminent domain to be included in the instrument of taking. See also H. 744. Status: Joint Committee on the Judiciary. (REBA position: support with amendments

S. 966 Enacts a good and clear record and marketable title act. (Landowners Title Protection Act). See also H. 743. Status: Joint Committee on the Judiciary. (REBA position: support)

S. 983 Facilitates registration at the Land Court of instruments executed on behalf of a corporation. Status: Joint Committee on the Judiciary. (REBA position: support)

S. 985 Establishes a 50-year limitation on sand rights and other profits àprendre, subject to extension, except that in no case shall any such interest in land expire any earlier than three years from the legislation's effective date. Status: Joint Committee on the Judiciary. See also H. 2104 (REBA position: support)

S. 1011 Prohibits any claim other than for fraud against any attorney rendering a title opinion or any prior record owner, by subrogation or otherwise, on behalf of a title insurer that has paid a claim. Status: Committee on the Judiciary. (REBA position: oppose)

S. 1857 Proposes 50-year statute of limitations under MGL c.40, §54A relative to statutory restriction on land in or appurtenant to old railroad rights-of-way. Status: Joint Committee on Transportation. (REBA position: support)

S. 1949 Supplemental Appropriations Bill, which included increases in recording fees and authorized the use of single-member LLC's in Massachusetts. Status: St. 2003, c.4, which included REBA-supported provisions to: make recording/registration fees for unregistered land and registered land uniform; simplify calculation of fees (i.e. no more per-page fees for deeds and mortgages); establish a $5 surcharge on fees to be dedicated to registry technology and operating needs; delay effective date by 120 days (i.e. July 14, 2003) for fee increases for mortgage discharges, releases and assignments; establish a Registries Advisory Board, including all registers of deeds, two REBA representatives and representatives of other registry constituen-

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Amicus Committee update

By Henry H. Thayer

The Amicus Committee is a joint committee of The Abstract Club and the Association. Its members are currently 16 real estate lawyers with many years of experience. They decide whether cases from trial courts or appellate courts are of enough significance and interest to the real estate bar to justify the preparation and filing of amicus briefs.

From time to time they also file briefs when requested to do so by the Appeals Court and the Supreme Judicial Court. All of their briefs, whether assigned to one or two lawyers to prepare, are reviewed by others of the Committee.

Here are the Committee's criteria for taking on a brief: (1) The case must be at the appellate stage; (2) The party seeking our brief must be on the correct side of the case, at least as far as the particular issue is concerned; (3) The matter must have far-reaching real estate law consequences; (4) As a corollary to item number 3, the matter must not be so fact-intensive that a ruling either way won't have much effect on established law.

The procedure is as follows: A request is sent with pleadings and the trial court judgment to the Chairman of the Committee. If the Chair is "conflicted" out, the Chair passes the request to another member of the Committee and takes no further part in deliberations about that matter.

If the Chair or designee finds that the request does not satisfy the above four criteria, the request goes no further unless the Chair wants the assessment of another member of, but not the whole of, the Committee.

If the request does not pass the criteria test, all papers are returned to the requesting party.

If the request appears to meet the four criteria, the papers are passed to all the members of the Committee. (In some cases, bulky exhibits and appendices are not distributed, but will be kept for the brief writer, if the Committee then votes to submit a brief). Before the papers go out, the Committee is given a very brief introduction to the matter, including the names of the parties. This identifies possible conflicts in the Committee and, if such are found, that member or those members are "blacked out".

The Committee must vote in near unanimity to submit a brief. It has happened that a minority member has gone ahead, outside of the Committee, to assist in an

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Henry Thayer has chaired the Amicus Committee for a number of years. He is a director at Rackemann, Sawyer & Brewster in Boston.

Update on the Committee on the Practice of Law by Non-Lawyers

By Jon S. Davis

The Committee on the Practice of Law by Non-Lawyers ("UPL Committee") was created in 1993 following the Association's success in a Superior Court civil action against Closings, Ltd.

Closings, Ltd was a non-attorney corporate settlement services provider, backed financially by Bain Venture Capital Corp, with a number of offices in eastern Massachusetts. After *Closings Ltd*, the Association Board recognized that the unauthorized practice of law was a continuing and growing concern in Massachusetts and that the Association required an on-going committee to deal with these emerging issues.

The Committee on the Practice of Law by Non-Lawyers is charged with the responsibility of assuring members that only lawyers may practice law as set forth in M.G.L. c. 221, §§46 and 46A. REBA is the only statewide bar association in Massachusetts asserting a vigilant position in the unauthorized practice of law area.

While all disciplines within the practice of law have been subject to UPL challenges, REBA remains focused and dedicated to confronting UPL issues in real estate transactions.

In 2001 REBA, in collaboration with many local and regional bar associations, prevailed in a civil action against Colonial Title & Escrow Company, Inc., a Rhode Island corporation based in Foxboro that was conducting non-lawyer closings.

For more information about the *Colonial Title* and *Closings Ltd.* decisions go to REBA's website at www.massrelaw.org and click on "Attorneys" and then go to "Recent Decisions."

The *Colonial Title* decision confirmed REBA's position that lawyers are better qualified to handle real estate loan closings because lawyers are more knowledgeable about legal issues and more likely to identify a problem than are non-attorney closing agents.

Attorneys are held to a higher ethical standard and the client's interests remain paramount. At the heart of this decision is the fact that it is in the public interest to have

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A former president of the Association, Jon Davis practices with Stanton & Davis in Marshfield. He is the 2002 recipient of the Richard B. Johnson Award, the Association's highest honor.

REBA's Legislation Committee: The voice of the real estate bar on Beacon Hill

By Daniel J. Ossoff

Unrecorded liens, curative title statutes and simplified recording procedures.

Not the stuff of headlines and not the types of issues that immediately grab the attention of our elected officials. But these and other matters of interest and concern to the real estate bar are the province of REBA's Legislation Committee.

Serving for many years as the eyes, ears and voice of the real estate bar on Beacon Hill, the Legislation Committee has an impressive resume of initiatives that have been successfully pursued in the General Court and the Governor's office on behalf of real estate practitioners.

The guiding principle of the Committee, and the focus of its efforts, has been on improving the law as it impacts the day-to-day practice of REBA's members by clarifying ambiguities in the law and enhancing the ability of its members to deliver effective service to all consumers of legal services in the real estate area.

The even-handed approach adopted by REBA in the legislative arena, acting through its Legislation Committee and through the efforts of its extraordinarily capable Legislative Counsel, Edward J. Smith, has earned REBA the recognition among elected officials and staff members alike as the voice of the entire real estate bar in Massachusetts.

A partial list of legislation supported by REBA, which has been adopted into law in recent years (see sidebar), can be found on the REBA website at www.massrelaw.org.

As can be seen from that list, the Legislation Committee has always attempted to respond to the issues of the day. In the early 1990s, this included several efforts in the area of mortgage foreclosure law, triggered by an unprecedented volume of mortgage foreclosures resulting from the real estate downturn and difficulty in obtaining mortgage financing which plagued that era (see Chapter 496 of the Acts of 1990 and Chapters 157 and 235 of the Acts of 1991).

By way of contrast, as can be seen one the front page in this issue, current efforts in response to an unprecedented level of refinancing activity in the residential market are focused upon finding an efficient means of insuring that mortgage discharges in suitable form are provided and recorded in a timely manner.

This represents only the latest in a series of efforts successfully undertaken by REBA to address mortgage discharge issues, including the passage of legislation in 1992 to expand the universe of individuals authorized to execute mortgage discharges (see Chapter 410 of the Acts of 1992) and 1996 legislation which permitted the execution of discharges by certain mortgage servicers or non-record note holders (see Chapter 480 of the Acts of 1996).

Other efforts have focused upon simplifying and/or modernizing procedures for the recordation or registration of documents, such as the elimination of the requirement of owner's duplicate certificates of title (see Chapter 481 of the Acts of 1996) or providing for the withdrawal of land from registration (see Chapter 413 of the Acts of 2000).

In a similar vein, REBA's Legislation Committee has remained actively involved in budgetary discussions impacting the funding of the registries of deeds as well as the Land Court, to seek to insure that those instruments of our state government which impact not only the practice of real estate law, but also the business of real estate, remain adequately funded and are provided with the resources to modernize to meet the current needs of commerce.

Nor are REBA's efforts in the legislative arena limited to matters of title and con-

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Dan Ossoff is the immediate past chair of the Legislation Committee and presently serves as REBA's president-elect. He is with the Boston firm of Rackemann, Sawyer & Brewster.

Legislation enacted with association support

Here's a partial listing of recent legislation enacted with support of the Association.

In the 1980s, the following bills were enacted as: St. 1987, c. 248 (extension of the validity of a municipal lien certificate to 150 days); St. 1987, c.481 (10-year statute of limitations relative to structural violations of zoning ordinances and bylaws; St. 1987, c.533 (authority for discharge of mortgage by recorded affidavit); St. 1987, c.675 (clarification of uniform recording requirements for federal liens); St. 1989, c. 205 (10-year statute of limitations on inheritance tax liens); and, St. 1989, c. 239 (provision for alternate members of planning boards; St. 1989, c.283 (simplified conversion of common law tenancy by the entirety to a statutory tenancy by the entirety).

The followings statutes were enacted in the 1990s with Association support: St. 1990, c.378 (clarification of fee interests regarding land abutting a way or similar linear boundary); St. 1990, c. 496 (exclusion from Soldiers and Sailors Civil Relief Act of proceedings against non-individual owners or record; and elimination of court approval of foreclosure documents on unregistered land); St. 1991, c. 157 (elimination of 30-day limitation for recording mortgage foreclosure papers; and provision for simplifying title from a foreclosure); St. 1991, c. 235 (clarification of scope of legislative moratorium on mortgage foreclosure); St. 1991, c. 320 (provision for consistent publication requirements for license to sell); St. 1992, c. 410 (simplified requirements for title following a discharge, release or assignment of mortgage); St. 1994, c. 245 (includes requirement of "good funds" in all mortgage transactions; see also St. 1995, c. 118); St. 1994, c. 341 (elimination of 90-day limitation for recording mortgage foreclosure papers); St. 1994, c. 350 (includes requirement that lender's attorney render a certification of title to the homebuyer in all purchase mortgage transactions); St. 1995, c.281 (authorize the creation of limited liability companies and registered limited liability partnerships in the Commonwealth); St. 1996, c. 151, § 567 (state superintendence of Registry of Deeds in Franklin County); St. 1996, c. 364 (modernizes and reforms state mechanics lien law, M.G.L. c. 254); St. 1996, c. 480 (permits reliance on discharges executed by certain non-record servicers and noteholders); St. 1996, c. 481 (eliminates the use of Owners Duplicate Certificates for registered land); St. 1997, c. 48 (state superintendence of Registries of Deeds in Middlesex, Worcester and Hampden Counties); St. 1998, c. 142 (conform mortgage foreclosure requirements for all business entities, including LLCs and LLPs); St. 1998, c. 242 (omnibus amendments to c. 183A, to permit revival of development rights, to clarify limited common elements, etc.);and, St. 1998, c. 300 (state superintendence of Registries of deeds in Hampshire, Essex, Suffolk and Berkshire Counties).

Thus far during the 2000s, the following statutes have been enacted with Association sponsorship and/or support: St. 2000, c. 413 (procedure for the voluntary withdrawal of land from the registration system); St. 2001, c. 26 (omnibus amendments to Article 9 of the Uniform Commercial Code); St. 2002, c. 393 (enlarges the concurrent jurisdiction of the Land Court to include cases of specific performance of real estate agreements; partition cases; general enforcement of M.G.L. c. 40A and c. 41, and certain local ordinances and bylaws by certiorari and mandamus); St. 2002, c. 496 (makes final and conclusive any order dissolving a lis pendens unless notice of appeal recorded with 30 days; requires commencement of action seeking a lis pendens to be by verified complaint, and permits expedited dismissal of claims found to be frivolous, with possible recovery of attorneys' fees and costs); and, St. 2002, c. 508 (authorizes recording of simplified trustees' certificate in lieu of the full trust instrument, notwithstanding "indefinite reference" statute).

Assistance available from REBA Ethics Committee

Philip D. Stevenson

When closing a loan for a new lender, is it all right to collect the recording fee for recording a mortgage discharge even though I know the old lender is charging a recording fee, in case the old lender sends the discharge to me instead of causing it to be recorded in the registry, and what do I do if I later find out that the old lender in fact did cause the discharge to be recorded?

Is it all right to prepare a second mortgage for a Rhode Island property when I am licensed to practice law in Massachusetts but not in Rhode Island and does it make a difference if I am not charging a fee but doing it as a favor for a friend?

I agreed to hold some money in escrow at a closing because there was some work that needed to be done to the property and the builder now says that the work is finished and wants the money; what should I do?

I have represented Lender A for some time and have recently been offered the opportunity to represent the developer of a condo in the sale of the units, where it is expected that most of the unit purchasers will borrow from Lender A. Is there any reason I can't represent both the developer and Lender A in the end sales?

These are actual examples of questions frequently presented to the REBA Ethics Committee. One of the principal functions of the Ethics Committee is to provide advice (we can't provide ethical opinions like the Board of Bar Overseers can) to real estate law practitioners about problems encountered in their everyday practice. If you need some advice, call REBA and you will be provided with a name to call.

The Committee also offers its views to the Board of Bar Overseers as to whether it would be appropriate to object, to acquiesce or to abstain from commenting when a person seeks to be reinstated as a lawyer after disbarment. By far the most common causes for disbarment of lawyers do not relate to "bad acts" in the conveyancing field and therefore for the most part the committee does not try to interject its own personal views on the conduct of the candidate.

The Committee on occasion also recommends to the Board of Directors an ethical standard regarding conveyancing practice, which if approved is presented to the full membership of REBA for approval.

And the answer to the first question above? Support the efforts of REBA to create new legislation improving the mortgage discharge process, particularly the problem of lost discharges.

In addition, one of the provisions of the proposed new legislation would require that the fee for recording a discharge would be collected at the time of recording of the mortgage, with the result that there would never again be the tension as to who should collect the fee for recording the discharge.

Phil Stevenson chairs the REBA Ethics Committee. He is of counsel in the Boston office of Hale & Dorr LLP.

The Forms Committee: Serving REBA members

By John M. Janiak

The REBA Forms Committee creates forms that aid all areas of real estate practice and relate to existing Title and Practice Standards. The Forms Committee's work and mission is one part of a triad with the Practice Standards Committee and the Title Standards Committee serving the real estate bar.

As new legislation is passed or existing legislation is revised or updated these three Association committees often act in concert to produce new standards and forms to complement the new legislation. All three committees are now using interactive technology to respond promptly to law changes. For more information about the Association's standards and forms, go to the website, www.massrelaw.org.

For example, in January 2003 with the passage of the new trustee's certificate statute, Chapter 508 0f the Acts of 2002 ("An Act Relative to Certain Trust Instruments") which became effective on Jan. 1, 2003, the demand from our members as well as from non-member estate planers for assistance in preparing certificates was strong and immediate.

The REBA Forms Committee acted immediately drafting and posting two suggested forms on the Association's website for comment and discussion. Many members began using these forms immediately.

Ultimately, REBA Form No. 35 was adopted at the Annual Meeting of the membership in November 2003. Comments and suggestions received from the membership at large as a result of our online posting were considered by the Committee and were instrumental in developing the final form.

REBA Forms save time and money since real estate practitioners do not have to "re-invent the wheel" for each transaction. These forms are the product of the collective experience of the Forms Committee, of the Association's Board and they are cross-referenced with the REBA Title and Practice Standards.

As good as a standardized form may be however, it does not obviate the need for the lawyer to adapt the form to specific facts to meet the needs of the client. In instances where the lawyers or legal

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John Janiak is a partner in the law firm of Prescott, Bullard & McLeod, which has offices in New Bedford and Edgartown. The firm, one of the oldest in the U.S., was founded in 1811. In practice since 1972, Mr. Janiak concentrates in residential real estate transactions, title insurance and condominium law.

Land Use Committee off to a running start

By Paul F. Alphen

One of many recent changes at the Real Estate Bar Association for Massachusetts last year was the formation of a new *ad hoc* committee, the Zoning and Land Use Committee. Recognizing that many REBA members have a direct or indirect interest in land use regulation, the Board established the new committee last January and appointed Paul F. Alphen, a Westford-based lawyer, as chair.

Key land use practitioners volunteered to join the Committee and the first meeting was held in February 2002.

The Committee intentionally includes a broad geographical representation to insure a wide range of perspectives. The ultimate goal in forming this Committee was to create a resource for REBA members, drawing on prominent practitioners in the field.

The Committee has become a valuable resource regarding a wide range of issues, including: the Zoning Enabling Act; local zoning by-laws; non-zoning land use by-laws; wetlands regulations; building permit moratoriums; the Subdivision Control Law; and environmental permitting.

Real estate lawyers, litigators, title examiners and general practitioners frequently encounter issues that relate to zoning and other land use regulations.

The current members are: Chairman Paul F. Alphen, Balas, Alphen & Santos, PC; Joseph M. Antonellis; Robert L. Bell, Jr., Cook & Bell; James M. Burgoyne, Fletcher, Tilton & Whipple, PC; Robert J. Capozzi, LandAmerica Commercial Services; J. Gavin Cockfield, Davis, Malm & D'Agostine, PC; John J. Curley III, McEvilly & Curley; Katherine H. Donnelly, Nixon, Peabody LLP; Saul J. Feldman; Richard J. Gallogly, Rackemann, Sawyer & Brewster, PC; Michael S. Giaimo, Robinson & Cole, LLP; Kevin M. Kirrane, Dunning & Kirrane, LLP; Charles N. Le Ray, Goodwin Procter, LLP; Ray Lyons; Philip H. Macchi; Stephen F. Madaus, Mirick, O'Connell, DeMallie & Lougee, LLP; Rachel Ann Morin, Law Office of Michael E. Lombard; Lee Barron Wernick; and, Peter Wittenborg, REBA.

The committee participated in the 2003 Spring Seminar conducting a well-attended "nuts and bolts" session entitled "Representing a Client before the Zoning Board." Last August, Committee members participated in a joint special

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Paul Alphen is a partner in the Westford firm of Balas Alphen & Santos, PC. He is beginning his third year of service on the REBA Board of Directors.

The role of the REBA Nominating Committee

By Henry L. Murphy Jr.

The Nominating Committee of the Real Estate Bar Association is charged with responsibility for nominating both Directors and Officers of the organization. Under the current bylaws Officers and Directors can be nominated for one-year terms; Directors may serve for a maximum of six one-year terms. Elections by the full Membership take place at the November Annual Membership meeting.

In addition, the Nominating Committee has authority to nominate individuals for the Association's most prestigious Richard B. Johnson Award. The award is presented from time to time to a member of the bar who has so distinguished herself or himself during his/her career as to deserve consideration for significant honor.

Larry Murphy chairs the REBA Nominating Committee and is a past president of the Association. He practices with Murphy & Murphy in Hyannis.

In 1978 the Massachusetts Conveyancers Association (now know as the Real Estate Bar Association for Massachusetts) established the award in memory of the late Richard B. (Dick) Johnson, a past president.

Dick Johnson was admitted to the Massachusetts Bar in 1939 after graduating from Harvard Law School. He joined the Boston firm of Ropes & Gray that year, but his legal career was almost immediately interrupted by military service in World War II. Johnson commanded a platoon of infantrymen who crossed the English Channel by glider and landed in Normandy on D-Day. Shot through the ankles while leading his men across a heavily defended causeway, he earned a Bronze Star for his bravery.

On his return from the war, he began to specialize in real estate law at Ropes & Gray. He became an active member of the Massachusetts Conveyancers Association and was elected a member of the Abstract Club. For many years, he supervised the work of former Land Court Chief Judge Marilyn M. Sullivan, who joined Ropes & Gray in 1951.

Ropes & Gray made him a partner in 1960. Johnson was also active in town affairs in his hometown of Swampscott, Mass., and served as moderator for several years in the 1960s. He was a co-author of *Town Meeting Time, which* became the bible for town meeting moderators. In 1967, together with Warren Carley, another partner at Ropes & Gray, he drafted the first statute in Massachusetts authorizing industrial development bonds that was designed to save the Fore River Shipyard in Quincy.

Johnson served as President of the Massachusetts Conveyancers Association in 1971 and 1972 and his expertise in all aspects of real estate law was highly regarded throughout the legal community.

He was also known as a man of great caring, kindness and wit and also a person who was not afraid to directly confront and remedy a problem with quick-thinking action. While leaving for lunch one day, Johnson came across two bank robbers attempting to escape from the lobby of the building that housed the State Street Bank. He was able to trap one robber in the revolving doors of the building and tackled the second would-be thief, holding him until the police arrived.

The Nominating Committee of the Real Estate Bar Association accepts recommendations for this Award.

Anyone desiring to recommend to the Nominating Committee a specific individual for a position on the Board of Directors of the Association or for the Richard B. Johnson Award should send a brief biography of the individual to Henry L. Murphy, Jr., Chairman, REBA Nominating Committee, PO Box M, 243 South Street, Hyannis, MA 02601, or by e-mail to murph.murphcapecod@verizon.net.

Determinations for the Richard B. Johnson Award must be made by the end of February and nominations for Directors should be received by the end of May preceding the year in which the term of office would commence.

REBA serves real estate bar with many educational offerings

By Pamela Butler O'Brien

In today's rapidly evolving legal environment, the experienced lawyer – let alone the new lawyer – sometimes struggles to stay current on changes in law and practice. The successful real estate practitioner today must be knowledgeable about non-real estate matters including elder law, family law, bankruptcy, taxation, estate planning and a host of other fields. REBA is committed to serving all our members with quality, timely education on a variety of real estate related topics.

The Continuing Education Committee plans and implements two annual educational seminars a year, the Spring Seminar, customarily given in May, and the Annual Meeting, given in November. The unique format of these meetings includes three or four morning breakout sessions, usually repeated in two different time slots, on a variety of current topics.

Pamela Butler O'Brien is Underwriting Counsel for Stewart Title Guaranty Company in its Boston office where she also handles claims for them. She joined Stewart Title three years ago after fourteen years of private practice in central Massachusetts. She has been an active member of REBA for 17 years and has chaired the Association's Continuing Education Committee for the past two years.

These 45-minute programs offer attendees an opportunity to bone up on a chosen specialty or obtain basic information about an emerging or evolving area of law. While registrants are able to choose which seminars to attend, every registrant receives the written materials for all programs.

Both the Spring Seminar and the Annual Meeting conclude with an afternoon review of pending legislation and recent Massachusetts case law with an impact on real estate. REBA's Legislative Counsel, Edward J. Smith, presents a summary of pending real estate-related legislation on Beacon Hill indicating the Association's position, if any, on each bill. This program affords REBA members an insider's view of the legislative process and an opportunity to offer views on pending legislation.

To keep REBA members abreast of new case law, Philip S. Lapatin, a partner in the Boston office of Holland & Knight, provides a concise review of the prior six months of developments in Massachusetts real estate-related law from the Supreme Judicial Court and the Appeals Court. Attorney Lapatin also provides a brief written synopsis and citation for each case in the REBA seminar syllabus.

In addition to the two major annual programs, the Continuing Education Committee often co-sponsors events with other bar associations, law schools, and MCLE. In 2003, we co-hosted joint seminars with Suffolk Law School's Office of Advanced Legal Studies and the City Solicitors and Town Counsel Association on the proposed Massachusetts Land Use Reform Act which would revise M.G.L. c. 40A.

Our reputation for providing timely, quality education has made many of our members much sought after speakers by a variety of other organizations.

The Continuing Education Committee, in response to requests from the members, is in the process of developing a new line of courses. Years ago, lawyers went to law school to learn theory and spent a time of apprenticeship with an experienced lawyer before hanging out their own shingle. The time spent with an experienced attorney taught the practical aspects of the profession, such as how to file Land Court petitions, who at the town level needed to do what before a new subdivision could be recorded, and how to complete a settlement statement.

Today, fewer lawyers have these apprenticeship opportunities. Consequently, REBA is in the process of developing a traveling seminar-type course on bread and butter basics for newer lawyers and compliance issues for seasoned attorneys. These shorter seminars will be offered in regional venues making the material more accessible at the local level. We are also exploring offering REBA courses to members in an online format.

The Continuing Education Committee serves REBA's more than 3,000 members with a whole host of benefits. The Committee members come from a variety of practices, both large and small. They come from firms specializing in conveyancing, municipal law, commercial real estate and title insurance.

The variety of backgrounds brings a variety of viewpoints to the committee making it more responsive to the needs of REBA members. As seminars must be planned months in advance, committee members are also at the forefront of breaking real estate issues. Anyone interested in joining this dynamic committee should contact Sharin Paaso, REBA's Chief Operating Officer or committee chair Pamela O'Brien at obrien@stewart.com.

A few modest proposals: suggestions for tackling the Massachusetts housing production crisis

By Greg D. Peterson

One Attorney's Opinion

The thesis of this article is straightforward: The cost of housing in eastern Massachusetts now threatens the long-term economic viability of the region. Lawyers, as much as planners, regulators and elected officials, have played a key role in driving up those costs, primarily through rules that govern (and unnaturally discourage) housing production at local and state levels. The permitting rules for housing production must be revised in numerous respects and at multiple levels of government if Massachusetts is to address this clear threat to our collective economic future.

According to recent articles in The Boston Globe, only two communities inside I-495 – Lawrence and Lowell – have median housing prices under $250,000, and condominium units, frequently in former two and three family structures, are now the de facto starter home. The Boston Standard Metropolitan Statistical Area now lags nearly 10 percent behind the rest of the country in home ownership levels. This state of affairs is not sustainable. The economic, environmental and human costs of the current arrangements are intolerable.

The fundamental problem has been well understood for at least four years and is supported by numerous academic and institutional studies: eastern Massachusetts just doesn't produce enough housing. But why not? Given the soaring prices, evidencing the substantial demand for housing, the market ought to be supplying housing, particularly multi-family housing, to fill the demand.

From recent conversations with state officials and leaders in the business community, it is clear that frustration with the multiple, and high, regulatory barriers to housing production in Massachusetts has reached a critical point – the point at which specific solutions need to be identified and acted upon with dispatch.

It is no longer sufficient to blame our traditions of local home rule and what The Wall Street Journal so aptly called "vasectomy zoning" (that is, local zoning with the specific goal of reducing the number of children in school systems). This is a problem of statewide proportions and the Commonwealth can and must act on a number of fronts to do what it can without overturning local home rule.

The remainder of this article will suggest a variety of ways in which lawyers in particular, in their professional and community capacities, and the organized bar, can work to level the regulatory playing field for housing, particularly multi-family housing and housing as a component of mixed-use projects. But at the outset, we should acknowledge that we have a problem with multiple sources.

Sources Of Problems

One source of the problem: It is simply too easy and too cheap for housing opponents to game the judicial system. Appellants of housing projects have substantial and unfair advantages in the judicial process. This blatant imbalance must be corrected. For example, even in communities that have zoned districts for multi-family housing or mixed-use projects, virtually every such project requires a special permit. And with good reason.

These are dense, complicated, often phased projects, that require good design and careful consideration of the timing of phases given other uses and activities in a neighborhood. Yet, despite the long and detailed local permitting processes established for these permits (particularly in urban communities), by state law special permits do not take effect on issuance.

The simple, and easily afforded, act of an appeal to Superior Court renders special permits ineffective pending a lengthy judicial process, and allows a tiny minority to thwart duly adopted municipal, regional and state goals. At present, despite the theoretical requirement for expedited action on zoning and permitting appeals, these actions frequently linger for over two years at the trial level, and another two years for appellate court review. Not many projects or project proponents have the financial capacity to sustain such delay.

Worse, appellants are not required to make any showing of substantial likelihood of harm as a matter of standing, nor held to account on loss of their appeal by any bonding mechanism. And with the passage of the anti-SLAPP statute a decade ago, any vestige of redress for project proponents completely disappeared. There are several legislative actions that could help address these inequities.

Legislative Solutions

First, special permits (at least for multi-family housing projects and mixed-use projects involving housing) should take effect upon issuance. As you would expect given the local legislative determination to allow the use with a special permit, and the further, detailed process entailed in applying for and receiving a special permit, the vast majority of special permits are upheld on appeal. A substantial number of builders and buyers will be willing to risk equity to proceed with housing projects in the face of groundless appeals if their special permits can simply take effect. They should have that right. And appellants will still have their day in court.

In addition, Chapter 40A should be amended to permit and to encourage courts to require the posting of bonds by appellants to cover the losses and costs suffered by housing and mixed use project proponents if their appeal fails. Special emphasis should be placed on the desirability of bonds for appeals of special permits, where success on the merits is statistically quite unlikely. Again, appellants will not be deprived of their day in court, but they should have to address the public policy consequences if their appeal is not well founded.

Third, "substantial likelihood of harm" (from the *Barvenik v. Newton* case) should be codified as the appropriate standard for standing in housing and mixed use project appeals, reversing the "plausible claim" standard from *Marashalian*. A similarly reasonable and responsible standing requirement should be adopted for all administrative appeals for all state agency issued permits and approvals.

Finally, the positive experience with the special business section of Superior Court, and the substantial body of zoning and subdivision law expertise which has accumulated in the Land Court, should form the basis for legislative authorization authorizing all multi-family housing project and mixed use project permit appeals to be centrally brought in or removed to Land Court.

Judicial Reform

Such legislative action should be coupled with two other judicial administration reforms. First, the Land Court should act aggressively to manage such cases, to press the parties to resolve differences promptly and efficiently through early referral to alternative dispute resolution, to establish and enforce tracking orders, to establish and adhere to firm dates for delivery of decisions and to adopt Superior Court Standing Order 1-96 for certiorari review, among other measures.

Second, the Appeals Court should similarly act aggressively to cut the troubling length of time required for appellate review of trial court decisions in housing and mixed-use project permitting cases.

Regulatory Reform

Of course legislative and judicial action to remove inequities from judicial review of multi-family housing and mixed-used projects incorporating housing is a necessary, but not sufficient, response to the magnitude of the crisis we face. The Commonwealth, both in its regulatory and administrative approach to the permitting of housing projects, and in its approach to the relationship between local incentives to zone for multi-family housing and local aid formulas, can and should take prompt and decisive action.

The Commonwealth's administrative agencies should move to require administrative appellants to have commented and objected in the state permitting application review process in order to have the right to appeal agency actions and permits (as is the case presently in Chapter 91 cases).

The Commonwealth should broadly adopt the federal EPA use of "programmatic general permits" (or their functional equivalent, self-certification) for a wide range of state environmental permitting programs that affect housing and mixed-use projects. One example is the advanced discussion among DEP, Massachusetts Audubon and others to completely eliminate superseding order wetlands appeals for work in the outer 50 feet of wetlands buffer zones, so long as no work takes place in the inner 50 feet of the buffer zone.

The DEP should, similarly, adopt a programmatic general permit approach to wastewater permitting for multi-family housing and mixed-use projects. It is difficult to understand why certain regions of DEP take as long as 18 months to process private sewage treatment plant applications under the groundwater discharge permit program. These plants, and their operation and maintenance, are well-tested technology, and produces superior results.

Certifications filed with DEP by a combination of soils evaluators, engineers and owners with respect to the use of an approved technology, satisfaction of Title V leach field standards, and the establishment of appropriate reserves for replacement of moving parts, should be more than adequate to address threshold environmental design matters and cause a permit to automatically issue. Such an approach could increase envi-

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An overview of new standards of conduct for notaries in Executive Order No. 455

By Eugene Gurvits

(Editor's note: Executive Order No. 455 appears in its entirety on pages 4, 20 and 21 of this issue.)

One of the most significant aspects of the real estate closing process is acknowledgment of the instruments to be recorded. If a deed, mortgage, or other document conveying an interest in real estate is not properly acknowledged, it will not be accepted for recording.

Should the improperly acknowledged instrument be recorded due to a registry error, such instrument will not impart constructive notice to a bona fide purchaser for 10 years following the recording. Effectively, for 10 years the document does not exist on record, and the original owner may sell or mortgage the property to a new party without regard to the unacknowledged prior instrument.

In the event that the owner declares bankruptcy, the trustee in bankruptcy steps into the shoes of the bona fide purchaser and takes title free of the unacknowledged documents. It is therefore hard to overstate the importance of the process of acknowledgment to a real estate transaction. Yet, for the longest time, real estate practitioners had only bare bones guidance to the specifics and legal consequences of the acts necessary to successfully acknowledge a document.

M.G.L.c.183, §§29-42 give general direction to the process but also raise several questions that could only be answered by educated guessing. For example, Section 29 of M.G.L.c.183 mandates that "a certificate of [a deed's] acknowledgment" be "endorsed" upon the deed. The statute, however, does not define the crucial terms "acknowledgment" and "endorsed" leaving us to make up our own forms of both acknowledgment and the signature of the acknowledging party.

Section 42 refers to the forms in the end of Chapter 183 but only as a suggestion for possible ways to acknowledge the instrument. In addition, the statute does not address the process of authentification of the identity of the person whose signature needs to be acknowledged. Back in the 1980s, there was a debate raging in the conveyancing community as to the propriety of asking the grantors on the deed for a form of identification prior to the acknowledgment.

Only after a series of forgery claims shook our industry did the practice of requiring a photo ID become standard. Additionally, we had to make up creative answers to a variety of acknowledgment-related issues including the propriety of an acknowledging party being related to a party in the transaction, necessity of a seal on an acknowledged instrument, and many others. Clearly, the acknowledgment practices were crying out for direction from an authoritative source.

Dramatic new executive order

This direction arrived in a dramatic fashion on Dec. 19, 2003, when Gov. Mitt Romney signed Executive Order No. 455 (03-13). The order not only clarifies and codifies some of the existing practices but also creates new ones in a way that calls for a revision of long-held assumptions about the process of acknowledgment.

For starters, the Order defines the meaning of the term "acknowledgment". Acknowledgment, pursuant to section 2 of the Order, is a notarial act in which an individual, at a single time and place: appears in person before the notary public and presents a document; is identified by the notary public through satisfactory evidence of identity; and indicates to the notary public that the signature on the document was voluntarily affixed by the individual for the purposes stated within the document, and, if applicable, that the individual had authority to sign in a particular representative capacity.

The act of acknowledgment is to be distinguished from "affirmation", "copy certification", "jurat", "oath", or "signature witnessing", all terms that are likewise defined in the Order. Thus, for a

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Frequently asked questions issued to clarify notaries Executive Order

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or a seal. It can be either a black ink stamp, or a seal that makes an indentation on the paper. The stamp or seal must contain: (1) the notary public's name; (2) the words "notary public," "Commonwealth of Massachusetts" or "Massachusetts", and "my commission expires on [commission expiration date]" or "my commission expires [commission expiration date]" or " commission expires [commission expiration date]"; and (3) a facsimile of the great seal of the Commonwealth of Massachusetts. If you are a current notary and have a seal that has all of this information except for the expiration date, you may obtain a black ink stamp that has your name and the expiration date. You would then use both the stamp and the seal each time you notarize a document.

What kind of journal do I need to keep?

The journal must be a bound book with sequentially numbered pages. The purpose of requiring a bound book is to prevent pages from being removed or altered. The book might be a special notary journal or a plain bound book with sequentially numbered pages from a stationary store. The Executive Order requires that the pages of the journal are sequentially numbered; a journal that has entries that are sequentially numbered will satisfy this requirement as well. Regardless of the kind of book you use, you must record all of the information required by the Executive Order.

I am a lawyer who conducts real estate or corporate closings that involve multiple documents. Do I have to record each individual document in the journal?

No. Section 11(c)(3) of the Executive Order specifically states that you may record a description of either each document or proceeding that involves your notarization. For example, if you notarize multiple documents at a corporate closing, you may include a single entry that describes the proceeding — "ABC and XYZ merger" — followed by the other information that is required by the Executive Order.

Can non-attorneys conduct real estate closings?

Conducting a real estate closing is the practice of law in Massachusetts. Thus, non-attorney notaries public may not conduct real estate closings unless they are employed by a law firm and are supervised by a lawyer. Absent other violation of the Executive Order, a non-attorney notary public who works for a bank will not have his commission revoked for notarizing bank documents relating to an equity line of credit or a refinance mortgage.

Can attorneys charge for their legal work drafting a document that they also notarize?

Yes. Notaries can charge no more than the statutory amount set forth in General Laws chapter 262, section 41 ($1.25 for a notarization). However, an attorney or other professional may still charge a fee for document preparation or other professional services that are provided in conjunction with a document that is then notarized.

What if I am not a resident of Massachusetts, but I use my commission to perform my job?

There will be a change made to the Executive Order so that individuals who either reside in the Commonwealth or who conduct business in the Commonwealth may be notaries. If you are currently a notary who does not live in Massachusetts but you conduct business in Massachusetts, you may continue to notarize documents.

Can I notarize a document if the person does not want to invoke a deity?

Yes. You may take an affirmation, which is the legal equivalent of an oath, but which does not require the person to invoke a deity.

Missing discharges and assignments of mortgage: looking for a solution to a vexing problem

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tation" among the states in providing remedies for missing discharges, strongly suggests that the problem is neither unique, nor easy to resolve.

The version of the Uniform Mortgage Satisfaction Act proposed for discussion at the November 2003 meeting of NCCUSL provides for damages for failure to record the mortgage satisfaction within 30 days of a request made to the holder of the mortgage, in the amount of any loss caused thereby, including reasonable attorneys' fees and costs, plus options for an additional flat sum of $1,000 or $100 per day up to a maximum to be determined in a final draft of the Act.

Possible Legislative Solutions

Some of the ideas being drafted by REBA's Legislation Committee are as follows.

A "mortgagee, mortgage holder, mortgage servicer or note holder" that is receiving payments under a mortgage note or other financial obligation secured by a mortgage, upon request by the mortgagor or other authorized person on his behalf, shall provide a written payoff statement within three business days.

If payment is made in accordance with such payoff statement, the mortgagee, mortgage holder, mortgage servicer, or note holder receiving the payment shall be responsible for recording or providing a proper discharge of said mortgage in accordance with new provisions of Section 55 of M.G.L. c. 183.

A mortgagee, mortgage holder, mortgage servicer or note holder that receives full payment of a mortgage on a one-to-four family residence, and either charges the borrower or withholds from borrower's funds any required recording fee for recording a discharge shall, within 45 days from receipt of the payoff, have the obligation to record, rather than just provide, a duly executed and acknowledged discharge together with necessary assignments and other authority-supporting documents.

If a mortgagee, mortgage holder, mortgage servicer or note holder fails to comply, it shall after forty-five days 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 fees charged to or withheld from the borrower and not refunded or credited plus $2,500, or such borrower's actual damages.

A related provision, effective with respect to mortgages recorded on and after a specific date to be determined, would provide for a single recording fee at the time of recording a mortgage that would include the fee for recording the discharge thereof – i.e., a prepaid fee that would result in no fee when the discharge is recorded, thereby obviating the need for mortgagees, servicers or closing attorneys to withhold discharge recording fees. (Fees to record assignments would still be charged by the registry.)

For a mortgagee, mortgage holder, mortgage servicer, or note holder that does not charge or withhold the discharge recording fee when it receives full payment based upon a payoff statement, it shall within 45 days of receipt of payment, provide to the closing attorney transmitting the payoff either a copy of a duly executed and acknowledged discharge that has been properly recorded, together with the recording information, or a duly executed and acknowledged discharge.

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. A mortgage servicer shall be jointly and severally liable with the mortgagee, mortgage holder and note holder for any failure or neglect to comply.

If the holder of a mortgage and note is not the holder of record, the discharge shall also specify by what instrument or instruments the holder became the holder of such mortgage and the note, with the recording information, or the holder himself shall record such documentation along with the discharge, or provide to the closing attorney such documentation in recordable form as may be necessary to establish the holder's status of record.

The documentation is to include, but not be limited to, the note, any assignments, certificates of change of name or certificates of merger.

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.

If a discharge is executed by a mortgage servicer, an attorney-in-fact under a power of attorney or other agent, such mortgage servicer, attorney-in-fact or other agent shall, in addition to the information and documents required of the mortgage and note holder, provide to the closing attorney the servicing agreement, power of attorney, or other written authorization from the mortgage and note holder in recordable form (with necessary recording fees), or the recording information for such documentation if already recorded in the registry district where the mortgage is recorded.

A mortgagee, mortgage holder, mortgage servicer, or note holder that refuses or neglects to record or provide a discharge, or necessary supporting documents relative to such mortgage within 45 days after such acceptance shall be liable in damages to the owner of the equity of redemption or his successors in an amount equal to the greater of $2,500 or the actual damages sustained by said owner or his successors as the result of such refusal or neglect.

A new provision will authorize a Massachusetts attorney to certify a facsimile of a mortgage servicer's service agreement or other authority document as a true copy.

In the case of a discharge by a servicer and the authority document is unavailable, authority may be supported by a mortgagor's affidavit, to which could be attached billing statements, written payment history or other acknowledgment of payment from the servicer or otherwise, as well as cancelled checks. Another alternative is an affidavit of either the attorney who paid off the mortgage pursuant to a payoff statement or by another attorney who has ascertained that such payment was made by a closing attorney.

In either case, the affidavit should affirm the inability to obtain the servicing agreement despite sending a demand by registered or certified mail to the servicer and the mortgage holder of record, and the fact that full payment was made and accepted. If the cancelled check is not available as evidence of such acceptance, it shall be sufficient if acceptance is ascertained by the affiant by communication with the servicer, with a confirmation letter (to be attached to the affidavit) by the affiant sent by certified mail to the servicer and the mortgage holder that, absent objection received in writing by certified mail, the affidavit may be recorded and conclusively discharge the mortgage.

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 noteholder 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.

The opportunity would be retained for an attorney to record a discharge by affidavit if the mortgagee, mortgage holder, mortgage servicer, or note holder fails either to record or provide to the closing attorney a discharge of a mortgage on one-to-four family residential property within a specified time period from receipt and acceptance of payment in accordance with a written payoff statement.

Such affidavit would also be permitted if there is a failure to record or provide the authority documentation for the entity executing the discharge. For wired funds a written confirmation of the same issued by the bank or other institution transmitting payment, including as may appear in a written printout by facsimile or other electronic transmission, that recites the beneficiary account number and other payee information prescribed in the payoff statement would be equivalent to a cancelled check to establish acceptance of payment, if attached to the affidavit.

Alternatively, a notice of intent to record such an affidavit may be sent with the mortgage payoff, and set forth the statutory authority for the same if the discharge is not provided or recorded within 45 days, and no further notice would be required.

No assignee of the mortgage being discharged whose assignment does not appear of record prior to the date the payoff was made shall have any right to any of the notices required in the statute for discharge by affidavit, nor shall said assignee have standing to object to a proper discharge that complies therewith, and such discharge shall be binding on any such assignee in favor of a bona fide purchaser or mortgagee for value without notice.

Statute Of Limitations

The statute of limitations for exercise of the power of sale for breach of condition of a mortgage would be reduced from 50 years to a period which, in the case of a mortgage in which no term of the mortgage is stated, would be 35 years from the recording of the mortgage and, in the case of a mortgage in which the term or maturity date of the mortgage is stated, 5 years from the expiration of the term or from the maturity date.

However, in either case, the limitations period is extended where 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.

Upon the expiration of such period provided herein, such mortgage shall be deemed to be discharged for all purposes without the necessity of further action by the owner of the equity of redemption or any other persons having an interest in the mortgaged property. This shorter limitations period shall also be applicable to any mortgage on registered land, and upon the payment of the fee for the recording of a discharge, such mortgage shall be marked as discharged on the relevant Memorandum of Encumbrances as for any other mortgage duly discharged.

A one-year grace period after the statute's effective date shall apply to any mortgage for which the limitations period would have already expired as a result of this legislation.

The passage of legislation sufficient to deal with this vexing problem remains an important goal of the REBA Legislation Committee and its Board of Directors. The Legislation Committee intends to work with all interested parties to seek to realize this goal during the current year.

Impact of new Massachusetts Business Corporations Act on real estate law: A primer

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subsection (c) of section 1.24, a document that is filed by the secretary of state pursuant to section 1.25 is effective: (1) at the time and on the date when it was approved for filing by the secretary of state; or (2) in the case of articles of organization, amendment or merger, at the time and on the date when the articles were received for filing by the secretary of state if the articles are not rejected by the secretary within such time after their filing as is specified in regulations promulgated by the secretary; (b) A filed document may specify a delayed effective time and date, and if it does so the document will become effective at the time and date specified. If a delayed effective date but no time is specified, the document is effective at the close of business on that date. A delayed effective date for a document may not be later than the ninetieth day after the date when it is received for filing by the secretary of state."

Section 124 of the Act deals with documents that are filed to correct previously filed documents. Such corrections are limited to documents: that contain typographical error(s); that contain incorrect statement(s); or that were defectively "executed, attested, sealed, verified, or acknowledged."

In general, filed corrections "are effective on the effective date of the document they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed."

Section 125 of the Act provides that: "(a) Upon receipt of a document for filing, the secretary of state shall record the date and time of receipt on or with the document and, if the person submitting the document or his representative so requests, furnish evidence of the date and time of receipt to such person or his representative in such form as the secretary of state shall determine… (c) If the secretary of state refuses to file a document, he shall notify the person or his representative in writing of the refusal and his reasons therefor within 90 days after receipt in the case of annual reports or within 5 days after receipt in the case of other documents."

Provisions Describing Allowable Corporate Powers

Section 3.02 of the Act provides that: "(a) Unless its articles of organization provide otherwise, every corporation shall have perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power…to purchase, receive, borrow, lease or otherwise acquire, to own, hold, lend, improve, use, transfer and otherwise deal with, and to sell, convey, mortgage, pledge, lease, exchange and otherwise dispose of, all or any part of its real or personal property, or any legal or equitable interest in such property, wherever located … to make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations, which may be convertible into or include the option to purchase other securities of the corporation, and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income … to lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment … (b) Unless its articles of organization provide otherwise, a contract of guarantee or suretyship made by a corporation with respect to the obligation of another entity, (i) all of the equity interest in which is owned, directly or indirectly, by the contracting corporation, or (ii) which owns, directly or indirectly, all of the outstanding stock of the contracting corporation, or (iii) all of the equity interest in which is owned, directly or indirectly, by an entity which owns, directly or indirectly, all of the outstanding stock of the contracting corporation, shall be deemed necessary or convenient to carry out the business and affairs of the contracting corporation."

The Act aligns Massachusetts law with U.S. majority law as most states already have based their business corporations laws on the ABA Model Business Corporation Act.

For sales of all or substantially all corporate assets in, or other than in, the regular course of business, Sections 12.01 and 12.02 of the Act provide that: "A corporation may, on the terms and conditions and for the consideration determined by the board of directors: (1) sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property in the usual and regular course of business; (2) mortgage, pledge, including any sale upon foreclosure of such pledge, dedicate to the repayment of indebtedness, whether with or without recourse, or otherwise encumber all or substantially all of its property whether or not in the usual and regular course of business; (3) transfer all, or substantially all, of its property to another corporation all of the shares of which are owned, directly or indirectly, by the corporation … Unless the articles of organization require it, approval by the shareholders of [the forgoing types of] transaction[s] described is not required. A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation's board of directors, if the board of directors proposes and the shareholders entitled to vote approve the proposed transaction."

Foreign corporations that transact business in the commonwealth must file a certificate with the Secretary's Office together with a legal existence certificate issued by the secretary of state for the state in which they were incorporated.

The following activities are specifically listed as constituting the transaction of business: "the ownership or leasing of real estate in the commonwealth; engaging in the construction, alteration or repair of any structure, railway or road; or engaging in any other activity requiring the performance of labor."

The following activities, without more, are specifically listed as not constituting the transaction of business: maintaining, defending, or settling any proceeding; maintaining bank accounts; creating or acquiring indebtedness, mortgages, and security interests in real or personal property; securing or collecting debts or enforcing mortgages and security interests in property securing the debts. Both such listings are subject to a caveat that neither delineation of activities is an exhaustive list.

Additional Document Filing Requirements

The Act recognizes the following classes or types of reorganization: (1) A foreign business corporation may become a domestic business corporation; (2) A domestic business corporation may become a foreign business corporation; (3) A domestic business corporation may become a domestic nonprofit corporation; (4) A domestic business corporation may become a foreign nonprofit corporation; (5) A foreign nonprofit corporation may become a domestic business corporation;

(6) A domestic business corporation may become a domestic other entity (e.g., a limited or general partnership, limited liability partnership or company, joint venture, joint stock company, business trust or profit and not-for-profit unincorporated association); (7) A domestic business corporation may become a foreign other entity; (8) One or more domestic corporations may merge with a domestic or foreign corporation or other entity; (9) a domestic corporation may acquire all of the shares of one or more classes or series of shares of another domestic or foreign corporation, or all of the interests of one or more classes or series of interests of a domestic or foreign other entity, in exchange for shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property, or any combination of the foregoing; and, (10) all of the shares of one or more classes or series of shares of a domestic corporation may be acquired by another domestic or foreign corporation or other entity, in exchange for shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property, or any combination of the foregoing.

These classes or types of reorganization are treated in the Act through parallel sections the provisions of which, to the extent possible, are written using the same or substantially the same language and, therefore, impose similar filing/recording requirements and similar substantive results.

In general, such provisions typically state that: Revised articles properly describing the transaction must be executed and filed with the Secretary's Office and recorded or filed in the registry of deeds in each district within the commonwealth in which real property of the corporation (or of the surviving entity or of any constituent corporation) is situated. When such revised articles become effective, title to all real property of the corporation remains in the corporation (or in the surviving entity) without reversion or impairment.

EXECUTIVE ORDER NO. 455

Governor issues standards of conduct for notaries

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satisfactory evidence of identity; and

(c) indicates to the notary public that the signature on the document was voluntarily affixed by the individual for the purposes stated within the document and, if applicable, that the individual had authority to sign in a particular representative capacity.

"**Affirmation**" shall mean a notarial act, or part thereof, that is legally equivalent to an oath in which an individual, at a single time and place:

(a) appears in person before the notary public;

(b) is identified by the notary public through satisfactory evidence of identity; and

(c) makes a vow of truthfulness or fidelity under the pains and penalties of perjury without invoking a deity.

"**Copy certification**" shall mean a notarial act in which a notary public:

(a) is presented with a document;

(b) copies or supervises the copying of the document using a photographic or electronic copying process;

(c) compares the document to the copy; and

(d) determines that the copy is accurate and complete.

"Credible witness" means an honest, reliable, and impartial person who personally knows an individual appearing before a notary and takes an oath or affirmation from the notary to vouch for that individual's identity.

"**Journal of notarial acts**" or "**journal**" shall mean a permanently bound book that creates and preserves a chronological record of notarizations performed by a notary public.

"**Jurat**" means a notarial act in which an individual, at a single time and place:

(a) appears in person before the notary public and presents a document;

(b) is identified by the notary public through satisfactory evidence of identity;

(c) signs the document in the presence of the notary public; and

(d) takes an oath or affirmation before the notary vouching for the truthfulness or accuracy of the signed document.

"**Notarial act**" and "**notarization**" shall mean any act that a notary public is empowered to perform under this executive order.

"**Notary public**" or "**notary**" shall mean any person commissioned to perform official acts pursuant to Article IV of the Articles of Amendment of the Massachusetts Constitution.

"**Oath**" shall mean a notarial act, or part thereof, which is legally equivalent to an affirmation, and in which an individual, at a single time and place:

(a) appears in person before the notary;

(b) is identified by the notary through satisfactory evidence of identity; and

(c) makes a vow of truthfulness or fidelity under the pains and penalties of perjury by invoking a deity.

"**Official misconduct**" shall mean:

(a) a notary's performance of any act prohibited, or failure to perform any act mandated, by this executive order, or by any other law, in connection with a notarial act; or

(b) a notary's performance of an official act in a manner found to be negligent or against the public interest.

"**Personal knowledge of identity**" shall mean familiarity with an individual resulting from interactions with that individual over a period of time sufficient to ensure beyond doubt that the individual has the identity claimed.

"**Principal**" shall mean a person whose signature is notarized, or a person taking an oath or affirmation from the notary.

"**Regular place of work or business**" shall mean a place where one spends most of one's working or business hours.

"**Satisfactory evidence of identity**" shall mean identification of an individual based on at least one current document issued by a federal or state government agency bearing the photographic image of the individual's face and signature; or on the oath or affirmation of a credible witness unaffected by the document or transaction who is personally known to the notary and who personally knows the individual; or identification of an individual based on the notary public's personal knowledge of the identity of the principal.

"**Seal**" shall mean a device for affixing on a paper document an image containing a notary public's name, commission expiration date, and other information relating to the notary public's commission.

"**Signature witnessing**" shall mean a notarial act in which an individual, at a single time and place:

(a) appears in person before the notary public and presents a document;

(b) is identified by the notary public through satisfactory evidence of identity; and

(c) signs the document in the presence of the notary public.

Section 3: Qualifications of Applicants.

(a) A person qualified for a notary public commission shall:

(1) be at least 18 years of age; and

(2) reside legally in Massachusetts.

(b) In the Governor's discretion, an application may be denied based on:

(1) submission of an official application containing a material misstatement or omission of fact;

(2) the applicant's felony conviction or misdemeanor conviction that resulted in a prison sentence;

(3) the applicant's conviction of a misdemeanor with probation or a fine, or conviction for drunk driving;

(4) the applicant's admission of facts sufficient to warrant a finding of guilt of any crime;

(5) a finding or admission of liability against the applicant in a civil lawsuit based on the applicant's deceit;

(6) revocation, suspension, restriction, or denial of a notarial commission or professional license by this or any other state; or

(7) any other reasons that, within the Governor's discretion, would make the applicant unsuitable to hold the commission as a notary public.

Section 4: Duration of Commission.

As set forth in Article IV of the Articles of Amendment to the Constitution of the Commonwealth, a person commissioned as a notary public may perform notarial acts in any part of the commonwealth for a term of seven years, unless the commission is earlier revoked or the notary resigns.

Section 5: Scope and Description of Duties.

(a) A notary public may perform the following notarial acts:

(1) **acknowledgments**;

(2) **oaths** and **affirmations**;

(3) **jurats**;

(4) **signature witnessings**;

(5) **copy certifications**;

(6) issuance of summonses for witnesses as set forth in section 1 of chapter 233; and

(7) witness the opening of a bank safe, vault, or box as set forth in section 32 of chapter 167.

(b) In completing a notarial act, a notary shall sign his or her name exactly as it appears on the notary's commission.

(c) A notary shall keep an official notarial seal that is the exclusive property of the notary, which may not be used by any other person.

(1) A notary public shall obtain a new seal if the notary public renews his or her commission, receives a new commission, or changes his or her name.

(2) The notarial seal shall include: the notary public's name exactly as indicated on the commission; the words "notary public," "Commonwealth of Massachusetts," and "my commission expires on [commission expiration date]"; and a facsimile of the great seal of the Commonwealth of Massachusetts.

(3) Each new notarial seal that uses ink shall, after the date of this Executive Order, use black ink.

(d) A notary shall take the **acknowledgement** of the signature or mark of persons acknowledging for themselves or in any representative capacity by using substantially the following form:

On this ____ day of _____, 20__, before me, the undersigned notary public, personally appeared _____ (name of document signer), proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose.

(as partner for _____, a corporation)

(as _____ for _____, a corporation)

(as attorney in fact for _____, the principal)

(as _____ for _____, (a) (the) _____)

_____ (official signature and seal of notary)

My commission expires _____

(e) A notary shall use a **jurat** certificate in substantially the following form in notarizing a signature or mark on an affidavit or other sworn or affirmed written declaration:

On this ____ day of _____, 20__, before me, the undersigned notary public, personally appeared _____ (name of document signer), proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding or attached document, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of (his) (her) knowledge and belief.

_____ (official signature and seal of notary)

My commission expires _____

(f) A notary shall **witness a signature** in substantially the following form in notarizing a signature or mark to confirm that it was affixed in the notary's presence without administration of an oath or affirmation:

On this ____ day of _____, 20__, before me, the undersigned notary public, personally appeared _____ (name of document signer), proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding or attached document in my presence.

_____ (official signature and seal of notary)

My commission expires _____

(g) A notary shall **certify a copy** by using substantially the following form:

On this ____ day of _____, 20__, I certify that the (preceding) (following) (attached) document is a true, exact, complete, and unaltered copy made by me of _____ (description of the document), presented to me by _____

_____ (official signature and seal of notary)

My commission expires _____

(h) A notary public may certify the affixation of a signature by mark on a document presented for notarization if:

(1) the principal affixes the mark in the presence of the notary public and of 2 witnesses unaffected by the document;

(2) both witnesses sign their own names beside the mark;

(3) the notary writes below the mark: "Mark affixed by (name of signer by mark)

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in the presence of (names and addresses of witnesses) and undersigned notary pursuant to Executive Order No. 455; and

(4) the notary public notarizes the signature by mark through an **acknowledgment**, **jurat**, or **signature witnessing**.

(i) The notary public may sign the name of a principal who is physically unable to sign or make a mark on a document presented for notarization if:

(1) the principal directs the notary to do so in the presence of 2 witnesses who are unaffected by the document;

(2) the principal does not have a demeanor that causes the notary public to have a reasonable doubt about whether the principal knows the consequences of the transaction requiring the notarial act;

(3) in the notary public's judgment, the principal is acting of his or her own free will;

(4) the notary public signs the principal's name in the presence of the principal and the witnesses;

(5) both witnesses sign their own names beside the signature;

(6) the notary public writes below the signature: "Signature affixed by notary public in the presence of (names and addresses of principal and 2 witnesses)"; and

(7) the notary public notarizes the signature through an **acknowledgment**, **jurat**, or **signature witnessing**.

Section 6: Prohibited Acts.

(a) A notary public shall not perform a notarial act if:

(1) the principal is not in the notary's presence at the time of notarization;

(2) the principal is not identified by the notary through **satisfactory evidence of identity**;

(3) the principal has a demeanor that causes the notary public to have a reasonable doubt about whether the principal knows the consequences of the transaction or document requiring the notarial act;

(4) in the notary public's judgment, the principal is not acting of his or her own free will;

(5) the notary public is a party to or is named in the document that is to be notarized;

(6) the notary public will receive as a direct or indirect result any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees set forth in section 41 of chapter 262 of the General Laws or has any financial interest in the subject matter of the document; or

(7) the notary public is a spouse, domestic partner, parent, guardian, child, or sibling of the principal, including in-law, step, or half relatives.

(b) A notary public shall not refuse to perform a notarial act solely based on the principal's race, advanced age, gender, sexual orientation, religion, national origin, health, disability, or status as a non-client or non-customer of the notary public or the notary public's employer.

(c) A notary public shall not influence a person either to enter into or avoid a transaction involving a notarial act by the notary public, except that the notary public may provide advice relating to that transaction if section 9(b) applies.

(d) A notary public shall not execute a certificate containing information known or believed by the notary public to be false.

(e) A notary public shall not affix an official signature or seal on a notarial certificate that is incomplete.

(f) A notary public shall not provide or send a signed or sealed notarial certificate to another person with the understanding that it will be completed or attached to a document outside of the notary public's presence.

(g) A notary public shall not notarize a signature on a blank or incomplete document.

(h) A notary public shall not perform any official act with the intent to deceive or defraud.

(i) A notary public shall not claim to have powers, qualifications, rights, or privileges that the office of notary public does not provide, including the power to counsel on immigration matters.

(j) A notary public shall not use the term "notario" or "notario publico" or any equivalent non-English term in any business card, advertisement, notice, or sign.

(k) A notary public who is not an attorney licensed to practice law in Massachusetts shall not conduct a real estate closing and shall not act as a real estate closing agent.

Section 7: Limitations of Discretion.

A notary shall perform any notarial act described in this executive order for any person requesting such an act who tenders the fee set forth in section 41 of chapter 262 of the General Laws unless:

(a) the notary public knows or has good reason to believe that the notarial act or the associated transaction is unlawful;

(b) the principal has a demeanor that causes the notary public to have a compelling doubt about whether the principal knows the consequences of the transaction or document requiring the notarial act;

(c) the act is prohibited by this executive order or other applicable law; or

(d) the number of notarial acts requested practicably precludes completion of all acts at once, in which case the notary public shall arrange for later completion of the remaining acts.

Section 8: Underlying Document.

A notary public has neither the duty nor the authority to investigate, ascertain, or attest to the lawfulness, propriety, accuracy, or truthfulness of a document or transaction involving a notarial act.

Section 9: Prohibition Against the Unauthorized Practice of Law.

(a) A non-attorney notary public shall not assist another person in drafting, completing, selecting, or understanding a document or transaction requiring a notarial act, rendering legal advice, or otherwise engage in the practice of law.

(b) This section does not preclude a notary public who is duly qualified, trained, or experienced in a particular industry or professional field from selecting, drafting, completing, or advising on a document or certificate related to a matter within that industry or field.

Section 10: Advertising Disclaimer Required.

A non-attorney notary public who advertises notarial services in a language other than English shall include in the advertisement, notice, letterhead, or sign the following, prominently displayed in the same language the statement: "I am not an attorney and have no authority to give advice on immigration or other legal matters."

Section 11: Official Journal.

(a) A notary shall keep, maintain, protect, and provide for lawful inspection a chronological official **journal of notarial acts** that is a permanently bound book with numbered pages.

(b) A notary public shall keep no more than one active journal at the same time.

(c) For every notarial act, the notary public shall record in the journal at the time of the notarization the following:

(1) the date and time of the notarial act;

(2) the type of notarial act;

(3) the type, title, or a description of the document or proceeding;

(4) the signature, printed name, and address of each principal and witness;

(5) description of the **satisfactory evidence of identity** of each person including:

(a) a notation of the type of identification document, the issuing agency, its serial or identification number, and its date of issuance or expiration; and

(b) a notation if the notary identified the individual on the oath or affirmation of a credible witness or based on the notary's personal knowledge of the individual;

(6) the fee, if any, charged for the notarial act; and

(7) the address where the notarization was performed.

(d) A notary public shall not record a Social Security or credit card number in the journal.

(e) A notary public shall record in the journal the circumstances for not completing a notarial act.

(f) A notary public shall record in the journal the circumstance of any request to inspect or copy an entry in the journal, including the requestor's name, address, signature, and evidence of identity. If the notary public refuses to allow inspection, the notary public shall record the specific reason for the refusal.

Section 12: Inspection of the Official Journal.

(a) In the notary public's presence, any person may inspect an entry in the **official journal of notarial acts** during regular business hours, but only if:

(1) the person's identity is demonstrated through **satisfactory evidence of identity**;

(2) the person affixes a signature in the **journal** in a separate, dated entry;

(3) the person specifies the month, year, type of document, and name of the person for the notarial act or acts sought; and

(4) the person is shown only the entry or entries specified.

(b) If the notary public has a reasonable and explainable belief that a person bears a criminal or harmful intent in requesting information from the notary public's journal, the notary public may deny access to any entry or entries.

(c) The journal may be examined without restriction by a law enforcement officer in the course of an official investigation, subpoenaed by court order, or surrendered at the direction of the Governor's Office.

(d) Upon complying with a request under subsection (a), the notary public shall provide a copy of a specified entry or entries in the journal, provided that other entries on the same page shall be masked.

(e) A notary public shall safeguard the journal and all other notarial records and surrender or destroy them only by rule of law, by court order, or at the direction of the Governor's Office.

(f) When not in use, the journal shall be kept in a secure area under the exclusive control of the notary public, and shall not be used by any other notary nor surrendered to an employer upon termination of employment.

Section 13: Duties at the End of the Commission.

When a notary commission expires, is resigned, or is revoked, the notary shall:

(a) as soon as reasonably practicable, destroy or deface all notary seals and stamps so that they may not be used; and

(b) retain the notarial journal and records for seven years after the date of expiration, resignation, or revocation.

Section 14: Change of Name or Address.

Within 10 days after the change of a notary public's residence, business, mailing address, or name, the notary shall send to the Office of the Secretary of State a signed notice of the change, giving both the old and new information.

Section 15: Revocation of Commission.

A notary public's commission may be revoked for **official misconduct** as defined by this Executive Order, or for other good cause, as determined by the Governor with the consent of the Governor's Council as set forth in Article XXXVII of the Articles of Amendments to the Massachusetts Constitution.

Given at the Executive Chamber in Boston this 19th day of December in the year our Lord two thousand three, and of the Independence of the United states of America two hundred and twenty seven.

MITT ROMNEY, GOVERNOR

SECRETARY OF THE COMMONWEALTH

WILLIAM FRANCIS GALVIN

GOD SAVE THE COMMONWEALTH OF MASSACHUSETTS

Real property interests could be extinguished by bankruptcy sale

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remaining term, including all extension terms. 11 U.S.C. §365(h).

Assuming that it would enjoy the benefits of Section 365(h) of the Bankruptcy Code, Precision remained in its leased premises after Qualitech's rejection of the lease. After closing, the buyer took possession of Precision's facility and changed the locks on the building. Precision brought an action in federal district court for trespass, conversion and wrongful eviction.

The district court referred the matter to the bankruptcy court in which Qualitech's case was already pending.

The Ruling

After the bankruptcy court found in favor of the buyer and the district court reversed on appeal, the Seventh Circuit Court of Appeals took up the issue presented by *Precision*. The Seventh Circuit first found that the rights of a tenant under Section 365(h) of the Bankruptcy Code constituted an "interest" in property and that property can be sold "free and clear" of that interest under Section 363(f) of the Bankruptcy Code. 327 F.3d at 545-46.

Disagreeing with the district court, the Court of Appeals did not find that the tenant protections of Section 365(h) overrode the debtor's right to sell property free and clear under Section 363(f). *Id.* at 547.

Instead, the court found that property can be sold free and clear of Section 365(h) rights, so long as one of the five tests of Section 363(f) are met. *Id.* at 547-48.

And, in Precision's case, one of the conditions had, in fact, been satisfied. By failing to object to the sale prior to the hearing on its approval, Precision was deemed to have given its consent to the sale. *Id.* at 548; *see* 11 U.S.C. §365(f)(2) (permitting sale free and clear if the entity holding the interest consents). Thus, the Court of Appeals held, the property had been sold free and clear of Precision's rights under Section 365(h) with its consent. *Id.*

Implications

Thus, the lesson of *Precision* seems clear: holders of interests in real estate that are proposed to be sold "free and clear of liens and interests" who fail to object to those sales do so at their own peril. Whether the interest arises under a lease, an easement, a restrictive covenant or the Bankruptcy Code itself, *Precision* makes clear that such interests are in jeopardy of extinction if the interest holder sits on its rights.

Failure to file an objection means that the interest holder can be deemed to have consented to the sale – thereby giving the bankruptcy court the basis upon which it can order the property sold free of the interest altogether, as long as notice of the sale has been sufficient. See *Precision*, 327 F.3d at 548; *see also Futuresource, LLC v. Reuters Ltd.*, 312 F.3d 281, 285 (7th Cir. 2002) (lack of objection "counts" as consent, provided notice is sufficient); *In re Savage Indus., Inc.*, 43 F.3d 714, 720-21 (1st Cir. 1994) (refusing to approve a sale free and clear of successor liability claims under §363(f), where insufficient notice given to potential claimants).

Recent Massachusetts Ruling

A recent decision of the Massachusetts bankruptcy court reinforces this lesson. In *Ragosa v. Canzano (In re Colarusso)*, a Chapter 7 trustee sought to sell property free and clear of liens. 295 B.R. 166 (1st Cir. B.A.P. 2003).

Among the bidders for the property was Mary Ragosa, the owner of a neighboring parcel, who also held an adverse possession claim to a portion of the property. *Id.* at 169. Although Ragosa submitted a bid to purchase the property, she did not file an objection to the sale, thus failing to raise the issue of the Chapter 7 trustee's power to sell it free and clear of her interest as an adverse possessor. *Id.*

After the conclusion of the sale, Ragosa commenced an action in Land Court to quiet title to the portion of the property in which she claimed an interest by adverse possession. *Id.* at 170. Affirming the bankruptcy court, the Bankruptcy Appellate Panel for the First Circuit held that the sale order precluded further litigation in the Land Court, and that Ragosa's rights as an adverse possessor had been extinguished. *Id.* at 175.

The panel determined that, because Ragosa's adverse possession claim had not yet been adjudicated when the Chapter 7 case commenced, the debtor's estate still had an interest in the property sufficient to give the bankruptcy court jurisdiction, which enabled the court to order a sale free and clear of liens and interests of that portion of the property subject to the adverse possession claim. *Id.* at 172-74.

The court further concluded that Ragosa's failure to object to the sale – especially where she had participated in the auction and therefore had adequate notice of the proceedings – constituted consent under Section 363(f)(2) of the Bankruptcy Code, providing the statutory grounds for the sale free and clear. *Id.* at 175.

Once again, a failure to object resulted in the extinguishment of a potentially valuable property right.

One significant aspect of the *Precision* decision is its ruling on the relief that would have been available to Precision had it objected timely to the proposed sale free and clear of liens and interests. The Seventh Circuit noted that, in connection with any proposed sale of estate property, parties with an interest in the property to be sold are entitled to "adequate protection" of that interest. 11 U.S.C. §363(e); see *Precision*, 327 F.3d at 547-48.

Thus, the Court held, an objecting lessee might not be entitled to continued possession of the property under Section 365(h), but would instead be entitled to be compensated for the value of its leasehold. *Id.* at 548. But such "adequate protection" may be cold comfort for an operating business faced with the task of relocating upon a sale free and clear of its leasehold interests.

In practice, one would hope that a timely objection by an affected tenant, coupled with an assertion of rights of continued possession under Section 365(h), would protect the tenant's continued possessory rights, rather than entitle it to a damage award.

Notably, the Seventh Circuit did not address the "uniqueness" of real property interests, and whether that quality would render a damage award inadequate under all circumstances. That issue might limit the risk that adequate protection damage awards are used to justify the elimination of real property interests in future cases, although there are few, if any, published decisions addressing this issue in the context of bankruptcy sales free and clear of liens and interests.

One other aspect of the *Precision* decision has caused consternation among real estate practitioners – its potential effect on leasehold mortgages. Put simply, the concern is that a leasehold mortgagee's collateral can be impaired, if not eliminated, through the vehicle of a sale free and clear of liens and interests. A closer look at the statute and the cases should allay these concerns, however.

Notably, pursuant to an amendment enacted in 1994, Section 365(h)(1)(D) provides that the rights afforded to tenants under the statute – namely, the right to remain in possession even after the landlord's rejection of the lease – extend to any "successor, assign or mortgagee permitted under such lease." 11 U.S.C. §365(h)(1)(D).

Since the permitted leasehold mortgagee has independent rights under the statute, it seems fairly clear that the mortgagee must receive notice and be provided an opportunity to object, prior to the entry of an order selling property free and clear of its lien. So long as the mortgagee does not sit on its rights – that is, so long as it files a timely objection – it should, in the least, be entitled to receive a monetary satisfaction that compensates it for the value of its lien on the tenant's leasehold interest in connection with any bankruptcy court-approved sale.

In sum, the teachings of the *Precision* and *Colarussa* decisions are clear. Any holder of an interest in real estate to be sold free and clear of liens and interests under Section 363(f) of the Bankruptcy Code must take the steps necessary to object to the sale, or face the loss of that interest.

Only by filing a timely objection can the interest holder ensure that it will not be deemed to have consented to the proposed sale. Inaction in the face of a sale motion will be interpreted by a bankruptcy court as a "deemed" consent under Section 363(f)(2) of the Bankruptcy Code, giving the court the statutory basis needed to extinguish the interest.

Regardless of the real estate lawyer's preconceived notions of the inviolate nature of certain real property interests, or the availability of the protections of Section 365(h) of the Bankruptcy Code, *Precision* and *Colarussa* make plain that, in bankruptcy sales, silence is not golden: It is suicidal.

The teachings of the *Precision* and *Colarussa* decisions are clear: Any holder of an interest in real estate to be sold free and clear of liens and interests under Section 363(f) of the Bankruptcy Code must take the steps necessary to object to the sale, or face the loss of that interest.

Flexible reading of the Mass. condominium statute

Continued from page 7

units. They must show the units as they have been built.

The solution is to describe the uncompleted units of the building as "convertible common areas" and to provide in the Master Deed that, when the units are completed, the Master Deed can be amended by the developer alone without the consent of any of the Unit Owners, changing convertible common areas to units.

When the units are completed, an Amendment to the Master Deed is recorded with a new set of "as built" floor plans showing the completed units in the areas formerly described as convertible common areas.

The paragraph in the Master Deed on Convertible Common Areas should reserve to the Declarant (the Developer) the right to convert any or all of the Convertible Common Areas into Units, Common Areas, or Limited Common Areas, and to reallocate the undivided interest of Units in the Common Areas to reflect the addition of new Units out of the Convertible Common Areas.

Avoiding Friction

This is a way to avoid the friction which often occurs with architects, professional engineers or land surveyors over whether the units are sufficiently complete for them to be willing to make the required "as built" certification on the plans. It avoids the issue over whether as built means that all walls, interior walls as well as exterior walls, must be completed in order for the architect, engineer or surveyor to certify that the units are sufficiently complete for them to certify that the plans depict the Units "as built."

Finally, title insurance is available for a condominium that provides for convertible common areas. The title policy will insure that such a condominium does not violate Chapter 183A.

The use of convertible common areas is a way to create the condominium and therefore to be able to start selling the completed units before all or even most of the units are completed.

The power of attorney at a real estate closing: What are the standards?

Continued from page 7

ing lawyers to have a written Power of Attorney from the client?

Does the secondary mortgage market require written Powers of Attorney? What if the signing attorney represents the Seller? Or is it the opposing counsel who is requiring the documentation of authority?

While there is a common rumor that the lenders are requiring written Powers of Attorney, that has been my experience only when representing a borrower (who usually attends the closing, or gives Power of Attorney in writing, because recordable documents need to be signed). In connection with Seller representation, most often it is the other attorney who asks for the Power of Attorney to keep in his or her file. Perhaps it's time to stop and think about whether it is necessary.

Litigators routinely sign pleadings on behalf of their clients without any documented authority except their appearance in the case. Real estate attorneys should be allowed the same authority to make representations on behalf of our clients. But is it the same? Those miscellaneous closing documents like the lead paint, parties in possession, urea-formaldehyde and title insurance affidavits, the 1099 and the HUD-1 Closing Statement contain important representations which, if inaccurate, can result in significant liability.

The REBA form of "Seller's Certification" (Form 11A) protects the attorney and client by clearly articulating the status of those matters that will be the subject of closing affidavits. The gathering of information contained in the Seller's Certification is crucial to properly representing the client who will be absent from the closing. In fact, asking the client the right questions and listening carefully to the answers is vital whether or not the attorney at law is signing pursuant to a written Power of Attorney.

Many of us believe that evidence of our authority to sign on behalf of clients (beyond admission to the bar) is generally not necessary. Still a good argument can be made that the better practice is to have a Power of Attorney and Certification from the client.

One concern articulated by the members of the Practice Standards Committee about adopting a Practice Standard clearly exempting attorneys from being forced to present a written Power of Attorney was that it may foster sloppy practice. Attorneys may attend closings without having asked the client about potential mechanics liens, or whether the house was owned and occupied as the Seller's primary residence for at least two of the last five years, with no business or rental use having been made of the home.

If the lawyer misrepresents the client in a representative capacity, both lawyer and client may be liable for the error. Whether or not the attorney has a written Power of Attorney she must take care that each document she signs on the client's behalf is accurate and authorized by the client. The Seller's Certification is vastly more important than the Power of Attorney in protecting both lawyer and client from future claims.

Where do we go from here?

The net result of our many discussions has been that REBA has no Practice Standard on this subject. Nothing saying that acceptable practice is to present (or require) written evidence of the lawyer's authority to sign for her client, and nothing saying that such written authority is not required.

Many of us believe that evidence of our authority to sign on behalf of clients (beyond admission to the bar) is generally not necessary. Still a good argument can be made that the better practice is to have a Power of Attorney and Certification from the client.

As to the analogy to the litigation bar, while complaints and answers are signed by lawyers, affidavits are signed only by the party having direct knowledge of the facts represented in the affidavit. The standard title insurance, lead paint and other affidavits are just that – *affidavits* – to be signed under the pains and penalties of perjury.

The common practice of obtaining a written Power of Attorney that contains the substance of the Seller's Certification seems to be a good practice. It does add to the weight of the closing package, but only by a few pages. And the proliferation continues.

Mark Your Calendars!

REBA 2004 Annual Meeting
November 15, 2004
Wyndham Westborough Hotel

Reforming the Massachusetts Homestead Act

Continued from page 6

tinuing sustenance in times of economic difficulty.

At that time it was possible to "set off" a portion of the family land, with house and garden area to be maintained as the homestead. Life has changed dramatically since then, but the structure of the Homestead Act has not.

Since 1851, the Homestead Act has been amended 22 times, mostly to increase the value of the exempt estate to keep pace with inflation and the rising value of real property. Some revisions have included the adoption of special elderly and disabled person protections while other changes have tinkered with the structure to try to make the homestead work better.

Every year legislation is introduced on Beacon Hill to further amend portions of the Act. Some would increase the amount of the exemption; some would make it automatic; others would seek to perfect perceived concerns with the operation of the Act.

REBA believes that the time has come for a complete revamping and rewrite of the statute to harmonize it with the needs of 21st century homeowners and eliminate the areas of confusion that exist in the present law.

Areas of concern involve decisions in Massachusetts state courts and the federal bankruptcy courts.

For example Massachusetts courts and the federal bankruptcy courts are discordant regarding the effect of Section 2 of the Act, which states, "The acquisition of a new estate or claim of homestead shall defeat and discharge any such previous estate." The federal courts have taken the position that the last recorded homestead is the effective one, revoking all prior recorded filings, while prohibiting "stacking" of both Section 1 and Section 1A declarations.

The Massachusetts courts on the other hand have found themselves in the position of divining which person of two first signed on the same document to determine which person is entitled to the benefit of the homestead declaration. And Massachusetts courts have not yet ruled on whether there may be both a Section 1 and a Section 1A homestead.

Further, we have yet to have a determination by any court whether it is possible to have two Section 1A elderly or disabled person homesteads.

During the last wave of residential refinancing sparked by record low interest rates, questions have arisen again regarding the proper interpretation of Section 6 of the Act and the need to subordinate the homestead (for which there is no provision in the Act) to a new mortgage or the need to release and re-record a new Declaration of Homestead.

It is REBA's position that Section 6 effectively allows for subordination of the homestead to a new mortgage. It would appear, therefore, that the recording of a new mortgage does not in and of itself result in termination of the homestead, although Massachusetts is a title theory state. But there must be certainty on this question.

Other issues requiring legislative resolution include whether unrelated persons may claim multiple (or proportional) homesteads in the same property. There is also the pending issue of how the concerns of non-traditional couples will be addressed where Section 1 provides benefits to "a husband and wife and their children" in light of the recent Supreme Judicial Court's *Goodrich* decision.

Many believe that homesteads should be automatic upon the acquisition of any owner-occupied residential real property. In many other states homestead is an automatic benefit of home ownership. Automatic homestead would eliminate expense and recording issues and offer all homeowners an equal benefit.

Ultimately this is an issue for the legislature taking into consideration the interests of all parties concerned, homeowners as well as lenders and creditors.

These concerns have been the subject of discussion and editorials in *Massachusetts Lawyers Weekly* and other publications, inviting the Real Estate Bar Association to take the lead to accomplish this reform. REBA will work with the legislature and other interested constituencies over the next several months seeking a complete rewrite of the Homestead Act. We cannot merely tinker with portions of the law resulting in further confusion and uncertainty.

We welcome your input and assistance in this process.

REBA believes that the time has come for a complete revamping and rewrite of the Homestead Act to harmonize it with the needs of 21st century homeowners and eliminate the areas of confusion that exist in the present law.

Now is the time to advertise . . . and REBA can help!

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telephone number, e-mail address, website and other information. REBA's ads will also identify you as a lawyer who is a member of the only bar association in Massachusetts devoted exclusively to real estate law.

Finally, as a further benefit and incentive to advertise, REBA will share in your cost of placing its co-operative advertisements in local publications with distribution to the public. Specifically, REBA will reimburse members for one-half of the cost the advertising, with a limit of $200 for each member per year. If you take advantage of this benefit, your entire annual cost of membership in REBA will be covered!

More information about the Co-Operative Advertising Program, along with a sample of our ads for viewing, is available on the "Members" section of our website at www.massrelaw.org.

A second opportunity for REBA members to market their real estate practice is to sign on to the lawyer listing on the Association's website. REBA's web site has been expanded to become a great resource for consumers seeking information about various real estate matters.

The "General Public" section of REBA's website contains a list of attorney members that is organized by town and is accessible to anyone searching for a local real estate attorney. Best of all, there is absolutely no cost for members to become a part of our lawyer referral list.

Update on Massachusetts Land Court

Continued from page 6

of the way but reaction to our new space otherwise is quite positive. The Causeway Street location is best reached by public transportation, getting off at North Station, which is located a long city block from the building. There is also parking available at a number of area parking garages.

New Court Appointments

I am delighted to note Gov. Romney's recent nominations of Keith C. Long of Kirkpatrick & Lockhart to the existing vacancy on the Land Court bench, and Deborah J. Patterson, one of our Assistant Clerks, to the position of Land Court Recorder. The Recorder's position has been vacant since Charles W. Trombly Jr., the court's long-time Recorder, was elevated to the bench in December 2002.

We are pleased that the Governor has recognized the importance of filling these critical positions by including them among his first nominations and we look forward to confirmation hearings before the Governor's Council this winter.

Court Initiatives

Two court initiatives are proceeding with the active participation of the conveyancing bar. Judge Leon J. Lombardi is completing the revision of the Land Court's Surveying Manual with the assistance of a hard-working committee comprised of both members of the bar and surveyors. This effort is nearing completion and we anticipate publication of the court's manual by mid-2004.

Judge Gordon H. Piper is working with a reconvened guidelines committee to update *The Guidelines on Registered Land* that were first published in May 2000. Since their publication, the registers of deeds, the bar and the court have worked with the guidelines and the committee is now synthesizing comments to respond to some areas of concern. Judge Piper had been a member of the original committee, as an attorney, before his appointment to the Land Court bench last year.

This is an exciting time for the Land Court. As we settle in to our new surroundings, we invite the bar's participation with us as we identify new methods and ways to serve the public. We look forward to seeing you at Causeway Street.

Title insurance: A primer for homeowners

Continued from page 6

of title provide the basic information concerning the legal interest affecting the title to real property. The title search and examination are more than an attempt to confirm the placement on the record of a subject mortgage; they are the underwriting process that distinguishes between significant and insignificant conditions affecting title.

Underwriting is, essentially, a judgment process: discerning between the important and the irrelevant. This search and examination very often includes the curing of defects to title necessary to complete the transaction. There are few properties with "perfect" titles and, as such, title insurance was developed to guarantee the current status of the title based upon the search and examination.

Title search and examination requires the search of numerous public documents including tax, court judgment, deed, encumbrance, federal and state records and the evaluation of real property characteristics such as flood zone and location. The ensuing policy of title insurance guarantees the condition of ownership and property rights as represented and provides indemnification of the insured that has a fee (ownership), leasehold or mortgage lien interest in a specific parcel of property for any covered loss caused by a defect in title that existed as of the effective date of the policy.

Title insurance is the acceptance of risk for *past* transactional events rather then *future* occurrence of events. Unlike most other insurance, which looks forward, title insurance looks to the past. And title insurance has a single one-time premium, no termination date and no time limit on the filing of claims.

Since title insurance involves the evaluation and acceptance of prior transaction-related risk, the underwriting process for title insurance differs markedly from almost all other types of insurance. The title underwriting process is designed to limit risk exposure through a through search and examination of the recorded documents affecting a particular property.

Title insurance does not respond to future occurrences but only to past defects that were in place at the time the property was sold and weren't then recognized as a problem. Since title insurance is an evidence-producing/loss prevention line of insurance, its loss expense is far less and it's operating expense far greater than other property/casualty lines of insurance.

Proposed HUD RESPA reforms update

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rate subtotals for the actual title insurance versus compensation to the title agent. Title agents routinely receive direct payments from borrowers for their services as well as commissions from the title insurance premium for the sale of insurance. The title agents subtitle will add up these costs so the borrower can compare, and possibly negotiate these charges."

The new GFE could require the disclosure of the portion of title insurance premium retained by the title agent and the portion rendered to the title insurance underwriter. According to Kirkpatrick & Lockhart attorney Phillip L. Schulman, former Assistant General Counsel of the Inspector General and Administrative Proceedings Division at HUD: "This is an unprecedented disclosure that would have little benefit to the borrower. Title insurance premiums are fixed under many state laws, and due to state anti-rebating and anti-discrimination prohibitions, the borrower would generally not be able to negotiate any kind of rebate or discount of the premium. Since disclosing the premium is split between title agents and underwriter would not facilitate consumer shopping in competition among providers, that proposed itemization appears to be of questionable value."

The Mortgage Packaging Exception

This rule will establish a "safe harbor" from RESPA violations for entities that offer "guaranteed mortgage package" transactions. This package will contain a guaranteed lump sum price for all lenders and government required settlement services, including a government loan at a guaranteed interest rate subject to change under certain circumstances.

As presently written, 12 U.S.C. §2607 prohibits kickbacks and unearned fees:

"(a) Business referrals. No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person. (b) Splitting charges. No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed. (c) Fees, salaries, compensation, or other payments. Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan; (2) the payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or for services actually performed."

Single-Package System

Under HUD's proposed single package system, in addition to guaranteeing the interest rate, there would be a lump sum guaranteed price for all lender services in the current HUD-1 settlement statement "800" series and most of the settlement services in the current settlement statement 1100,1200 and 1300 series.

As only lenders can guarantee the interest rate and lender services in the "800" series, the single package approach would only allow lenders to offer guaranteed loan packages to consumers.

Under the two package proposal, according to the reform paper issued by the Real Estate Services Providers Council, Inc. the following is an example of how the two package system will work in the case of a home purchase transaction:

"1. Consumer works with real estate broker on purchasing a home. When the contract is signed, broker refers consumer to local lender for a Guaranteed Mortgage Package (GMP) and to broker's affiliated title company for a Guaranteed Settlement Package (GSP). 2. The broker provides consumer a RESPA-required affiliated business arrangement disclosure when referring the consumer to its affiliated title company, in which it discloses its financial interest in the title company the estimated range of charges for the services being referred.

"3. Local lender offers consumer a 6 percent loan with a $750 Guaranteed Mortgage Package (GMP) that includes all discount points and loan origination services needed to make the loan (the 800 series of current HUD-1 Settlement Statement). 4. Local lender also offers consumer a $925 GSP that includes all other settlement services that local lender requires for that particular loan. 5. Broker's affiliated title company offers consumer a $900 GSP. The GSP is conditional on a lender accepting it for the loan that consumer ultimately selects.

"6. Consumer also shops on the Internet and finds that a national lender is offering a 5.75 percent loan with a $700 GMP and a $950 GSP for that loan. 7. Consumer now has two loan/GMP offers: Local lender's 6 percent loan with a $750 GMP and national lender's 5.75 percent loan with a $700 GMP. 8. Consumer now has three GSP offers: Real estate broker's affiliated title company's $900 GSP, local lender's $925 GSP and national lender's $950 GSP. 9. After consumer confirms that national lender accepts broker's affiliated title company's GSP, consumer accepts national lender's 5.75 percent loan/$700 GMP and broker's affiliated title company's $900 GSP."

The offer set forth by the packager will be available to the borrower for at least 30 days at no cost, and upon acceptance of the package, the packager, the lender (if other than the packager), and the borrower must sign the GMP agreement which would replace the GFE in package transactions.

The GMP must include and guarantee the cost for a number of settlement services including title services and insurance. The "safe harbor" from Section 8 for the GMP will allow payments between entities within the guaranteed package and will also allow the required use of affiliated entities as service providers within the package. This "safe harbor" will allow a settlement provider to negotiate discounted prices as long as the originator charged the borrower the entire discounted price that the originator has negotiated.

HUD further ignores the decisions in *Echevarria v. Chicago Title & Trust Co.* 256F.3d623 (7th Cir 2001) and other cases which have held that while RESPA prohibits kickbacks and fee-splitting, RESPA is not a rate setting statute and has noted that RESPA cannot be violated unless there is an actual splitting of fees between two parties.

Reaction to the claims of HUD that the Section 8 exemption will keep hidden costs down has led to various criticisms that the proposal is anti-competitive and damaging to small businesses. Certainly the impact on small businesses is of concern as the situation affords lenders the opportunity to assemble settlement services and negotiate low prices. In the past, the Association has been in contact with Senators Edward Kennedy and John Kerry as well as those Massachusetts Congressmen who have been serving on the Rules and Banking Committees to express our concerns with the impact of one-stop shopping on the conveyancer in Massachusetts.

It is now believed that the reform rule when issued by HUD might include a two package proposal that will allow both lenders and non-lenders to offer guaranteed settlement service packages directly to consumers.

This solution has been suggested by the American Land Title Association which would include offering a "guaranteed settlement package" that could be offered by any party including title insurers and title insurance agents. This package would provide a guaranteed single price for all the 1100 series services and charges, the 1200 series charges and those charges that might be listed in the 1300 series.

According to ALTA "the two package approach would achieve HUD's goal of insuring price certainty in the settlement process for consumers and injecting significant, shoppable price competition into both the lending and settlement industries." The two-package approach will allow settlement providers to market directly to consumers rather than relying on referrals from lenders.

Recent Developments

The issue of RESPA reform remains undecided, and just as I am completing this article, Mel Martinez, the Secretary of Housing and Urban Development, has announced his resignation to run for the Senate in Florida and on Dec. 16, 2003 HUD delivered its RESPA Rule (as a final rule rather than re-proposed rule) to the Office of Management and Budget.

OMB has advised the American Land Title Association that it can turn a rule around in 5 minutes or it can take many weeks. How this rule will be treated is still unclear.

ALTA had been advised that the rule would not be published prior to Congress returning to Washington, DC in January 2004, but subject to change. The rule, once published, cannot become effective for a minimum of 60 days to allow Congress to review it. It is anticipated that the rule would have an even longer delayed effective date.

Amicus Committee update

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appeal, which the Committee has turned down. The Committee has no objection to that.

The Committee receives no compensation for its services.

Among matters in which the Committee has submitted briefs are: *Rowley v. Massachusetts Electric Company*, 438 Mass. 798 (2003); *Massachusetts Broken Stone Company v. Town of Weston*, 430 Mass. 637 (2000); *Tattan v. Kurlan*, 32 Mass. App. Ct. 239 (1992), review denied 412 Mass. 1105 (1992); *Tetrault v. Bruscoe*, 398 Mass. 454 (1986).

Copies of many of the amicus briefs are available on the Association's web site, www.massrelaw.org.

The electronic future of the registry of deeds

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recorded since 1630 have been recorded from 1950 to the present, making the conversion of the older documents to electronic images achievable.

Expanding the computerized index is a bigger challenge. Hiring an outside contractor to reindex the older documents would be prohibitively expensive and registry staffs made lean by tight budgets cannot do it on their own.

A possible solution is to convert the existing indexes to "electronic books" by scanning their pages into a simple search program that would allow the customer to flip through computerized pages the same way he would the actual index book. The registry in Greenfield has been operating such a program for years. It could be easily duplicated in other registries and added to the Internet.

With the Commonwealth's enactment of the Uniform Electronic Transaction Act on Nov. 26, 2003 (to become effective 90 days thereafter), electronic recording has joined the new computer system and Internet access as the third leg of the registry of the future.

Electronic Transactions – A New World

At the risk of over simplifying a complex operation, electronic recording should work as follows.

A lawyer will use her own computer, scanner and software to create a TIFF image of an already signed and notarized document. The lawyer will then log on to the secure ACS Electronic Recordation Exchange website, select the type of document she wishes to record and then enter all data – grantor and grantee names, property address, consideration, marginal references – that would ordinarily be entered by registry clerks at the recording counter.

With a few more clicks by the lawyer, the ACS site will transmit this recording package (the document image and associated data) to the registry where a clerk will ensure that the data and document image meet the minimum requirements for recording. Within seconds, the data that was entered at the law office will flow into the registry's computer as if it were entered at the recording counter.

The document image will be electronically stamped with the time of recording and the book, page and instrument numbers. The ACS system will do a wire transfer of the recording fee from the lawyer's bank to the registry's account. And finally, an electronic receipt and an image of the recorded document will be sent back to the customer.

All Recorded Land documents may be recorded this way (but no Registered Land) and the ACS system will be able to handle more sophisticated forms of electronic recording that involve no paper at all. The Middlesex North Registry will begin recording electronically in March 2004. More information about this process is available at the registry website, www.lowelldeeds.com.

The technology and procedures for electronic recording are relatively new and each company's electronic recording product is different. Since the ACS Electronic Recordation Exchange was included in the purchase price of the computer system installed in the registry in 2002, it will be the first to be used. As other products become available, feasible and affordable, they will certainly be integrated into the system.

A new computer system, total Internet access, and electronic recording are radically changing the registry of deeds and the legal culture that has evolved along with it. With the need for numerous, bulky record books eliminated, the size of the registry office will shrink. With all records freely available on the Internet, the need to physically come to the registry will be greatly reduced.

For the registry, this will mean fewer terminals, printers and tables, less congestion, shorter recording lines and reduced competition for precious parking spaces. With electronic recording, the time-consuming trip to the registry that now involves weather, transportation, parking, security and lines (or paying someone else to do it) will be replaced by a few keystrokes and mouse clicks on the office computer.

As traditional functions are performed more efficiently, registry staff can be diverted to other tasks that will improve the overall quality of service. Lowell, for example, has operated a satellite recording office for Cambridge since June 2002 that permits customers to record documents for two separate registries within one building. A reciprocal Middlesex North satellite office will open in Cambridge after that registry converts to the ACS computer system. With lessons learned from that experience, customers in Lowell should soon be able to record documents for any registry in the state.

While this article describes the benefits of new technology at just one registry, comparable innovation is occurring at each of the state's registries of deeds every day. If registries and their users imaginatively embrace the power of today's technology, the registry of deeds of the future will be a model of efficiently delivered governmental services.

Software and technology survey shows conveyancers fairly tech savvy

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software industry. Most believed that the software they purchased was easy to use and to train others to use.

Yet, ease of use was not what most of those who were surveyed liked best about their system. They believed that the updating of the software and the forms it produced was most important.

Finally, there were very few who did not feel that the current offerings in the New England conveyancing software market were sufficient to meet their needs. Whether it is complimentary HUD-1 and title insurance policy document prep software offered by the title insurers or the robust full document and accounting packages sold by the likes of Standard Conveyancer and Pro Docs, the membership felt fairly well-served.

In the future, we expect more software providers offering Internet-based applications and connectivity to the Internet through existing systems. Already plans are afoot by the software companies to include electronic delivery of title insurance policies and closing documents through their systems. Most already offer an e-mail delivery function.

The Technology Committee will shortly publish the full details of the survey as well as a corollary survey conducted of the companies producing some of the most commonly used conveyancing software offered in New England.

We welcome questions and comments from Association members.

www.massrelaw.org

REBA's Legislation Committee: The voice of the real estate bar on Beacon Hill

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veyancing. The Legislation Committee has been involved in efforts as diverse as supporting the 10-year statute of limitations added to Chapter 40A in 1987 to cover structural violations of zoning (see Chapter 481 of the Acts of 1987) and providing support for efforts which culminated in omnibus amendments to Article 9 of the Uniform Commercial Code (see Chapter 26 of the Acts of 2001).

Three bills passed into law at the end of 2002 reflect the wide range of REBA's efforts on Beacon Hill. Those bills provided for expanded jurisdiction of the Land Court to include, among other things, partition cases and certain additional land use matters (see Chapter 393 of the Acts of 2002), provided for an expedited procedure for dissolving a lis pendens (see Chapter 496 of the Acts of 2002), and authorized the recording of a simplified trustee's certificate in lieu of the full trust instrument (see Chapter 508 of the Acts of 2002).

Budgetary discussions during the current calendar year, which culminated in a supplemental appropriations bill passed into law as Chapter 4 of the Acts of 2003, further highlight the diverse areas in which REBA and its Legislation Committee become involved.

Not only was REBA actively involved in those budget discussions with regard to the changes in recording fees which were a part of that bill (seeking, among other efforts, to insure uniformity in fees and to provide for the surcharge included in that bill to be dedicated to the needs of the registries of deeds), but the association simultaneously was supporting provisions in that bill which allowed for the formation of single-member limited liability companies in Massachusetts.

Just as the legislative process rolls along from year to year, so does REBA's Legislation Committee. Under its current chair, Robert H. Kelley of Piper Rudnick, and through the ongoing efforts of Edward Smith, the Committee continues to pursue any number of legislative initiatives during 2004.

In addition to the extensive effort which has been undertaken to address the difficult problem of obtaining appropriate forms of mortgage discharges, the Committee is also actively involved in efforts which it is hoped will culminate in a complete rewrite and update of Chapter 188, the Massachusetts homestead statute. Constant tinkering with that statute over the years has resulted in inconsistencies and ambiguities which haunt both the real estate and bankruptcy bars, and resolution of those ambiguities, as well as general modernization of that statute, are the goals of REBA and the other bar associations with whom it hopes to work in this effort.

Other bills currently being actively supported by REBA include bills seeking to establish 50-year statutes of limitations with respect to sand rights and other similar rights in land, as well as with respect to the statutory restriction (in M.G.L. c. 40, § 54A) relative to construction on land in or appurtenant to former railroad rights of way, and a bill seeking to establish a marketable title act.

Appearing in this issue and also posted on REBA's website is a list of ongoing legislation of interest to the real estate bar with information as to the status of that legislation and the position which has been taken by REBA, if a formal position has been adopted, as to each bill.

REBA's Legislation Committee remains diligent in its efforts to respond to the legislative interests of the real estate bar in Massachusetts, and to insure that those interests are represented at the State House.

Mass. estate tax liens affecting inadequate transfers: A primer

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Furthermore, if you were doing a transaction within the three-year period and even if you knew the transferor was alive at that time, you had to keep your fingers crossed that the transferor did not die before the three-year period expired.

Until a statutory amendment to M.G.L. c. 65C, §14, in 1985, bona fide purchasers from the nominal consideration transferee were not protected. Since being amended by St. 1985, c. 711, s. 15, M.G.L. c. 65C, § 14 (b), has provided protection against the Massachusetts Estate Tax Lien for bona fide purchasers from the nominal consideration transferees, but only when the transfer is an outright transfer of the transferor's interest in the property.

The second sentence of c. 65C, § 14, provides: "Any part of such real property, which, prior to the decedent's death, was conveyed by a deed of the decedent **not disclosing an intention that it take effect in possession or enjoyment at or after his death and such deed was recorded or registered prior to the decedent's death**, and any part of such personal property[2] **transferred by**, or transferred by a transferee of, such spouse, transferee, trustee, surviving tenant, person in possession of property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, **to a bona fide purchaser, mortgagee or pledgee, for an adequate and full consideration** in money or money's worth **shall be divested of the lien** provided in subsection (a), **and a lien shall then attach to all the property of such spouse, transferee**, trustee, surviving tenant, person in possession, beneficiary, or transferee of any such person, **except any part transferred to a bona fide purchaser, mortgagee or pledgee** for an adequate and full consideration in money or money's worth." (emphasis added)

In other words, if the decedent had transferred title to real property for nominal consideration and the deed (1) was recorded prior to death and (2) did not disclose an intention that it take effect in possession or enjoyment at or after his death, then what I refer to as an "Evaporating Estate Tax Lien" or a "Domino Estate Tax Lien" arises with respect to that property.

Under this provision, the lien is there against the property until it is transferred by one of the various categories of transferees mentioned in the statute to a bona fide purchaser, mortgagee or pledgee, for value. Notice that the statute does not require that the bona fide purchaser, mortgagee or pledgee (I'm not sure what that might be in a real estate context) have to be without notice of the lien. All they need to do is pay value.

Thus, as to a bona fide purchaser or mortgagee,[3] the lien evaporates from the property upon the recording of the deed or mortgage to them. As to the nominal consideration transferee (donee), the lien evaporates from the property deeded to a bona fide purchaser or mortgaged to a bona fide mortgagee but then attaches to all the remaining property of the donee, including the proceeds of the sale or mortgage loan.

Even then, however, upon sale or mortgage of any of the donee's remaining property, the lien evaporates again as to the bona fide purchaser or mortgagee and remains with the remaining assets of the donee and attaches to any proceeds of the transaction coming to the donee. Thus, as to the donee, the lien is more in the nature of a domino lien than an evaporating one.

As a result of this statutory amendment, we need no longer be concerned about the Massachusetts Estate Tax Lien being imposed on property transferred outright by a decedent before his or her death no matter how long or short the time frame, so long as the deed is recorded prior to death. Accordingly, we just need to run the owner of property up to the point the deed is recorded to make sure there is no evidence in the Registry or Probate records of the transferor's death before the deed gets recorded.

There is still the risk, of course, that the transferor may have died prior to recording but outside the county or the state. But, first, that is still relatively rare and, second, given the intent of the statute, under those circumstances, a purchaser for value would not only be a bona fide purchaser but a bona fide purchaser without notice of the pre-recording death and, therefore, the potential attachment of the lien, and would be protected against any assertion of the lien by the Department of Revenue.

REBA (nee the Massachusetts Conveyancers Association) eventually adopted Title Standard No 61 to help guide conveyancers and title examiners in the basic application of the bona fide purchaser protection under M.G.L. c. 65C, §14 (b).

That standard provides as follows: "A transfer of an interest in real estate is free of the Massachusetts Estate Tax Lien, where, prior to a transferor's death, such transfer is made for apparently less than adequate consideration; and, (1) the deed or other instrument evidencing the transfer did not disclose any intention that it take effect upon or after the death of the transferor; and (2) such deed or other instrument was recorded prior to the transferor's death; and, (3) subsequent to such recording or registration such real estate interest was transferred by the transferee or by his subsequent transferee to a purchaser for adequate consideration. Comment: With reference to (1), a deed reserving a life estate in the transferor discloses an intention that it takes effect upon or after the death of the transferor. With reference to (3), the last referenced transfer may have occurred before or after the original transferor's death."

As indicated by the Comment with respect to item number (1) of the standard, one of the major issues that usually arises in these situations is determining if the nominal consideration transfer deed "disclose[s] an intention that it take effect in possession or enjoyment at or after [the transferor's] death." If it does disclose such an intention, then the "evaporating"

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Status report on pending bills in the Massachusetts Legislature (2003-2004)

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cies (e.g., banks, mortgage companies, title insurers, real estate brokers) to advise both county and state registers concerning technology plans

H. 177 Requires a mortgagee that has received payment in accordance with its payoff statement to record the discharge of mortgage. Status: Joint Committee on the Judiciary. (REBA recommending omnibus mortgage payoff, discharge legislation)

H. 180 Permits certain corporations to perform real estate closings, notwithstanding statutory prohibition on the practice of law by non-attorneys. Status: Committee on the Judiciary. (REBA position: oppose)

H. 2731 Requires written payoff statement to be provided by a mortgagee or servicer within five days of a request by the mortgagor or his designee. Status: Joint Committee on Banks and Banking recommended ought to pass; House floor action pending. (REBA recommending omnibus mortgage payoff, discharge legislation)

H. 4400, §§ 224, 225 (as appearing in House FY2004 Budget) incorporated H. 3732, Governor's Message to expand the scope of the state's lien for medical assistance benefits (MassHealth) to include joint property and other non-probate estate property of a decedent recipient. Status: St. 2003, c. 26, §§ 329, 330. (amended to include REBA's technical amendments limiting the lien to the decedent's *interest* in real property and protecting record titleholders.)

Other Legislation

S. 103 Proposes new Massachusetts Business Corporations Act. Status: St. 2003, c.127, approved Nov. 26, 2003. (REBA recommended title-related amendments, which were included)

S. 946 Establishes a Western Division of the Land Court, sitting in Worcester. Status: Joint Committee on the Judiciary

S. 964 Legislation relative to notice of contract under M.G.L. c.254 and dissolution of mechanics liens. Status: Joint Committee on the Judiciary

S. 965 Legislation to relax the statute of limitations for use violations under G.L. c. 40A, § 7. See also H. 742. Status: Committee on the Judiciary

S. 995 Increases the homestead exemption to $500,000. Status: Joint Committee on the Judiciary recommended ought to pass; passed by the Senate; House Committee on Steering & Policy

S. 1056 Creates an estate of homestead by operation of law and without the need for a recorded instrument. See also H. 1319. Status: Joint Committee on the Judiciary

S. 1118 Requires construction mortgage lien holders to fund advances for subcontractors, notwithstanding recording of mechanics lien. Status: Joint Committee on the Judiciary

S. 1140 Establishes new procedural requirements in foreclosing residential mortgages, including expanded notice of debtor's rights; right to cure up to one day prior to the conduct of the foreclosure sale; non-responsibility of debtor for mortgagee's legal fees if default is cured within 60 days of mortgagee's notice of intent to foreclose; requirement of court approval for foreclosure sale conducted earlier than 180 days after notice of intent to foreclose; requirement of a court determination of fair market value of the property foreclosed in any suit for deficiency; and post-foreclosure accounting requirements, including relative to price upon any resale by foreclosing mortgage holder within 18 months. Status: Joint Committee on the Judiciary

S. 1245 Sustainable Development Act. Status: Joint Committee on Natural Resources. See also H.2483.

S. 1250 Proposes a Massachusetts Land Use Reform Act. Status: Joint Committee on Natural Resources. See also S. 1174 (Joint Committee on Local Affairs)

S. 1251 Livable Communities Act. Status: Joint Committee on Natural Resources.

S. 2045 Recodifies certain statutory authority of the Commissioner of Banks in determining the powers of state-chartered banks, including by reference to the Gramm-Leach-Bliley Act of 1999. Status: Joint Committee on Banks and Banking recommended ought to pass; Senate Committee on Ways & Means

S. 2076 Gives legal effect to electronic signatures on contracts and other documents; and authorizes governmental agencies to convert documents to electronic storage Status: St. 2003, c. 133, approved Nov. 26, 2003

H. 381 Converts a Section 1 homestead to a Section 1A homestead by operation of law when the person who has filed the Section 1 declaration of homestead reaches age 62. Status: Joint Committee on the Judiciary

H. 1322 Establishes a recitation of statutory powers for fiduciaries having legal title to or control over real or personal property for which there are environmental issues requiring action by the fiduciary. Status: Joint Committee on the Judiciary

H. 2192 Clarifies rights of mortgagees in assignments of rents and profits in real property. Status: Joint Committee on Banks and Banking recommended ought to pass; House Committee on Bills in Third Reading

H. 2733 Requires as a precondition to foreclosure of a mortgage on property owned by an individual age 62 or more, that a representative of the mortgagee, accompanied by an elders agency representative, visit the property and explain the terms and conditions of the foreclosure. Status: Joint Committee on Banks and Banking

H. 3963 Establishes an Environmental Appeals Board for review of DEP proceedings. Status: Passed by the House and Senate; returned by the Governor with an amendment that substitutes the text of H. 3990; no further action.

H.1891 Provides new regulation of notaries public, in part to curb the unauthorized practice of law. Status: Joint Committee on the Judiciary. See also H.4217, filed by the State Secretary, passed by the House and pending before the Senate Committee on Steering & Policy. See also draft Executive Order by the Romney Administration, to which REBA has recommended revisions.

H.4240 Omnibus legislation to amend M.G.L. c. 40B, to promote affordable housing and community planning. Status: Recommended by the Joint Committee on Housing and Urban Development; House Committee on Ways and Means

H.4320 Provides that the acquisition of a new homestead estate shall not "defeat or discharge" a previous homestead of record. Status: Joint Committee on the Judiciary (REBA position: opposed in this form)

Update on the Committee on the Practice of Law by Non-Lawyers

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lawyers in control of each loan transaction.

Those seeking to undermine the practice of law argue that any added value a lawyer brings to such a real estate transaction also adds costs to the consumer. This is simply not true. No reputable study or set of statistics exist that supports this proposition and none will exist as long as the lenders establish the closing fees to be charged at the point of initial contact with the consumer.

The REBA UPL Committee is comprised primarily of past presidents and current officers of REBA. As a result, those who have leadership experience and know and understand the importance of the UPL issue to REBA members make all decisions of the Committee.

While REBA has been a pioneer on UPL issues, other groups have begun to take notice. Last October the American Bar Association Standing Committee on Lawyers' Title Guaranty Funds sponsored a two-day national symposium on UPL in residential real estate transactions in Arlington, Va.

REBA President Dick Keshian, UPL Committee Counsel, Douglas W. Salvesen and 2004 UPL Committee Chair Jon Davis participated with lawyers from seven other states. The ABA is planning a second symposium later this year.

Although much of the Committee's work goes unreported to the members, the Committee remains very active. One of our primary responsibilities has been to discuss UPL violations with the offending non-lawyer companies and to provide business models, which would bring them into compliance with the *Colonial Title* decision.

The Committee also spends time investigating complaints brought to the Committee's attention from you, REBA members. This information is vital and we strongly urge all members to continue to forward to REBA all information and closing documents, including HUD settlement statements, which might indicate violation of UPL laws.

Finally, the Committee continues to monitor and remain in contact with our real estate attorney colleagues in such states as Kentucky, North and South Carolina, Virginia, Delaware and Rhode Island who face similar UPL issues.

The Forms Committee: Serving REBA members

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staff need only to "fill in the blanks" the interactive feature of the REBA website, www.massrelaw.org, can be utilized. REBA forms are produced in a "PDF-fillable" format, which means that the "fill in the blanks" sections can be completed while online, and then printed.

Because of the geographic diversity of its members, the Forms Committee has conducted most its business via e-mail, fax and teleconference. In 2004, REBA will have "ListServ" or "OnLine Forum" technology available for the Forms Committee and also for other committees.

This will encourage more effective communication and participation among committee members. The Forms Committee welcomes new members and REBA members interested in joining should contact the chair at jjaniak@prescottbullard.com.

In 2004, the Forms Committee expects to develop several forms for use in connection with the REBA-sponsored proposed real estate mortgage discharge legislation. This will be one of the most important and timely challenges the committee has had to deal with. Any REBA members with suggestions for useful forms should contact the committee chair.

Land Use Committee off to a running start

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education program with the City Solicitors and Town Counsel Association (CSTCA), focusing on local zoning and land use issues with a special emphasis on the proposed reforms of M.G.L. c. 40A, the Massachusetts Land Use reform Act.

The participants welcomed the opportunity to dialogue with CSTCA members from around the Commonwealth. Seminar attendees were the beneficiaries of hearing sometimes contrary perspectives on the interpretation of zoning laws and the proposed Massachusetts Land Use Reform Act.

The Committee remains intensely interested in the status of the proposed Massachusetts Land Use Reform Act and has organized sub-committees for purposes of reviewing M.G.L. c. 40A. The sub-committees will evaluate inconsistencies and other deficiencies in the current statutes while considering constructive criticism of the proposed reform legislation as it evolves.

We anticipate continued involvement in continuing legal education programs and continued interest in proposed amendments to land use statutes and regulations.

Mass. estate tax liens affecting inadequate transfers: A primer

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lien provisions of the statute won't apply as indicated by the Title Standard.

The life estate situation discussed in the Comment is quite common nowadays and presents a clear instance in which possession and enjoyment by the remainders must, as a legal matter, await the life tenant's death. Of course, there are other obvious situations, such as when the transferor deeds to himself and others, thereby retaining a fractional interest as a tenant in common, joint tenant or tenant-by-the-entirety (ignoring the moiety aspects of the latter for purposes of this issue).

In addition to the more obvious retained interest situations just mentioned, we have other types of interests that may be considered to take effect in possession or enjoyment at or after the transferor's death that may not be so obvious.

Revocable transfers may be considered as taking effect at death, particularly where the right to revoke does not expire until the transferor does. Revocable trusts would be a classic example, especially where the transferor is the lifetime beneficiary and other beneficiaries must await his or her death to obtain their remainder interest. Less subtle would be a transfer to a trust, whether or not revocable, in which the transferor is the lifetime beneficiary and the trustee.

In accordance with IRC §2038, revocable transfers might also include transfers with retained powers to alter, amend or terminate the transfer or the trust. Such provisions are frequently seen in Massachusetts in real estate title holding trusts, whether nominee trusts or true trusts, so be very circumspect about nominal consideration transfers to trusts.

A transfer in which some form of power of appointment (i.e., the power to control who ends up with the property), by will or otherwise, may also be deemed to fall within the category of transfers considered to take effect in possession or enjoyment after death of the transferor. While not seen very often, a lease-back arrangement, especially with nominal rent, may also fall within this category. Essentially, about the only time you're safe in relying on the "evaporating" lien provisions of Chapter 65C, §14, and Title Standard No. 61 is when the transfer is an outright transfer of all of the transferor's interest in the property.

[1] M.G.L. c. 65C, s. 14 (a) provides: "Unless the tax imposed by this chapter is sooner paid in full, it shall be a lien for ten years from the date of death upon the **Massachusetts gross estate** of the decedent . . ." [Emphasis added.] Thus, even if the decedent didn't have any ownership interest at the time of death in property brought back into the Gross Estate under the "contemplation of death" rule, the property was subject to the Estate Tax Lien.

[2] It seems that a comma should have been placed here so that the rest of the discussion about the property being divested of the lien upon transfer out of the donee to a bfp would apply to the real property conveyed by an *inter vivos* deed as well as to personal property. Without the comma, grammatically, it might look like the lien divestiture provision applies to such real property immediately upon the *inter vivos* recording of the deed to the donee without the necessity of a transfer by the donee to a bfp. Such a result, of course, wouldn't make much sense.

[3] I'm going to drop reference to "pledgees" from this point forward.

A few modest proposals: suggestions for tackling the Massachusetts housing production crisis

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ronmental protection while smoothing the path for multi-family housing projects in or near many of our existing village centers or suburban transit nodes.

For that matter, one might also ask why the limit on Title V septic system discharges should not return to 15,000 gallons per day for projects involving only multi-family housing. That 5,000-gallon per day differential is sufficient to produce another 45 bedrooms, at a fraction of the cost of private sewage treatment plants, which have economies of scale. And given that only domestic sewage will be produced and property management is, by definition, centralized for multi-family housing, the risk of Title V non-compliance is virtually nonexistent.

The MEPA review process should take a fresh approach to housing and mixed-use project reviews. First and foremost, the "latest project through the door" should not be required to bear the disproportionate burden of past environmental degradation in other portions of a city, town or region. The classic example is the requirement that new housing and mixed use projects remove three times the storm water they will generate, in order to address historic combined sewer overflow problems elsewhere in a community. This is enormously expensive and destructive of critically needed housing production.

In addition, MEPA comment periods should not be routinely extended. Supplemental EIRs should not be required except under the most unusual circumstances for housing and mixed-use projects. Projects which provide only limited parking and are located in infill/brownfields areas (which I would propose be initially defined as all Economic Target Areas in Massachusetts so as to include older suburbs as well as cities) should not be routinely scoped for traffic or receive traffic sign-off upon the filing of an expanded ENF or DEIR with a good meso-scale air quality analysis.

Finally, MEPA should eliminate or drastically cut back on scoping for "land" jurisdiction for all such infill/brownfields sites (which, by definition, have been used before). If we are serious about smart growth, we must recognize the disturbing frequency with which smart growth projects are subjected to higher environmental standards and infrastructure burdens hurdles than other projects.

At the same time, the Commonwealth can and should commit to encouraging use of the new District Improvement Financing tool passed by the Legislature last year. This tool allows localities to adopt creative zoning for a redevelopment area and to capture a portion of the incremental property tax revenues generated in the district to support bonds for environmental remediation, new or refurbished infrastructure, and related costs.

The Commonwealth should create a joint task force among the economic development agencies, interested groups such as the Massachusetts Municipal Association, the Real Estate Bar Association, Citizens Housing and Planning Association, National Association of Industrial and Office Properties and the like, to evangelize the tool among municipalities and to establish the necessary state regulations at the earliest possible date.

The Commonwealth should also consider adopting a policy of presumptive approval for all locally requested DIF areas located with Economic Target Areas and for all multi-family housing and mixed use projects wherever located.

Last but certainly not least, state leaders should act on the Commonwealth Housing Task Force recommendations for eliminating the school funding disincentives to zoning land for multi-family housing. It is understandable (although not supported by available data) that many citizens believe parents are attracted to apartment or condominium living and will bring their offspring with them.

The proposals of the Commonwealth Housing Task Force for state payments to localities upon re-zoning and permitting of multi-family structures, and further state aid to cover the marginal educational cost of all children living in such structures on an ongoing basis, go a long way to removing the largest political hurdle to cooperation by local government in housing production. We must accept the reality of home rule in Massachusetts and address the lack of land zoned for multi-family housing through exactly such local aid formula mechanisms.

From the courthouse, to the legislature, to administrative agencies, to city councils, planning boards and town meetings, lawyers are involved at every turn. If we care about the long-term economic, social and environmental health of Massachusetts, it is time to use the publicly-issued licenses we possess to practice law to reduce the judicial, legislative, regulatory and zoning barriers to housing, barriers we have frequently constructed or permitted to continue with those same licenses.

Ladies and gentlemen of the bar, tear down these walls.

An overview of new standards of conduct for notaries in Executive Order No. 455

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document to be recorded, the signatory, or one of them, must be personally present in front of the notary, show a proper proof of identity, and say "the magic words".

It is not necessary for the signatory to sign the document in the presence of a notary (unlike acts of jurat or signature witnessing which require the document to be signed in front of a notary). Note however, that all of the acts of the signatory necessary for a proper acknowledgment must be performed at the same time and place. A signatory, for example, may not appear in front of a notary, have the document acknowledged, and then later show up with an appropriate proof of identity.

In fact, the term "satisfactory evidence of identity" is also defined in the order. There are three ways to determine the identity of the signatory. The notary may have known the individual for a period of time to establish beyond doubt that the individual "has the identity claimed". The notary may take an oath of a credible witness unaffected by the transaction who personally knows the signatory and who is also personally known to the notary.

Finally, and probably most commonly, the notary may examine a picture ID containing the signatory's signature and issued by a state or federal government (a privately issued document, such as a credit card, a building entrance pass or a college ID, is not sufficient).

Once the individual appears in front of a notary, is identified, and makes the appropriate statement, the notary may take the acknowledgment. The form of the acknowledgment appears in Section 5(d) of the order and is somewhat different from the ones we have become accustomed to over the years:

On this ___ day of _____, 20__, before me, the undersigned notary public, personally appeared _____ (name of document signer), proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose.

(as partner for_____, a corporation)

(as _____ for _____, a corporation)

(as attorney in fact for _____, the principal)

(as ____ for _____, (a)(the) _____)

_____ (official signature and seal of notary).

My commission expires _____

It appears that henceforth this is the only form of acknowledgment recognized as such by the Commonwealth. If a document gets on record with the acknowledgment different than the one appearing above, there may be a legitimate concern regarding the sufficiency of the acknowledgment.

Fortunately, notaries who received their commission prior to the date of the order have sixty days to comply with its provisions. It would be wise to use this time to change all of the forms (including deeds and mortgages) that require acknowledgment so that they comply with the defined terms of the Order.

As the form of the acknowledgment indicates, the notary's signature and seal must be affixed to the document. The form of the seal is set by Section 5(c) of the Order. The seal *must* include the following: the notary's name exactly as it appears on the commission; the words "notary public"; the words "Commonwealth of Massachusetts"; the words "my commission expires on [commission expiration date]; and, facsimile of the great seal of the Commonwealth of Massachusetts. Any seal that uses ink must henceforth use black ink only.

Previously, many notaries kept using

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An overview of new standards of conduct for notaries in Executive Order No. 455

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the seal without the expiration date, so that they would not have to reorder a new seal every seven years. Section 5(c)(1) of the Order makes it clear that a notary must obtain a new seal every time his or her commission expires to reflect the current commission date. A notary must also obtain a new seal if there is a change of the notary's name. Again, if the notary's current seal is not in compliance with the above requirements, the seal must be changed within 60 days from the date of the Order.

Clarifying what is a 'mark' on a deed

The conveyancing community has long debated the sufficiency of a mark on a deed or other document presented for recording. While there has been no case law or statutory authority for the practice, some commentators suggested that documents bearing a mark in lieu of a signature are acceptable provided they are witnessed by two individuals (for example, Eno and Hovey suggest that "although no witnesses are legally required, it is customary to have one or two witnesses sign beside the mark". Eno and Hovey, *Massachusetts Practice v.28 Real Estate Law with Forms*, 3rd edition, West Publishing Co. 1995. §4.37).

By setting the rules of acknowledgment of marks, the Order effectively ended any confusion with regard to the form of a document bearing a mark. Section 5(h) of the Order provides for the following procedure:

The principal affixes the mark in the presence of the notary and two witnesses unaffected by the document; (1) both witnesses sign their own name beside the mark; (2) the notary writes below the mark: "Mark affixed by (name of signer by mark) in the presence of (names and addresses of witnesses) and undersigned notary pursuant to Executive Order No. 455"; (3) the notary acknowledges the signature by mark.

Thus, in addition to the notary, two individuals whose names and addresses are known to the notary and who are unaffected by the transaction must witness the signing by a mark. Further, if a principal is incapable of signing the document, a notary may sign the document at the principal's direction in front of two witnesses.

While the order establishes the proper way of acknowledging marks on a document, it does not appear to invalidate documents already recorded that fail to comply with this directive. Such documents will have to be reviewed on an individual basis to determine whether their failure to comply with the provisions of the Order is fatal to the conveyance.

Non-lawyer notaries

The Order also addresses the participation of a notary in a real estate closing. Section 6(k) of the Order states: [a] notary public who is not an attorney licensed to practice law in Massachusetts shall not conduct a real estate closing and shall not act as a real estate closing agent.

While at first blush this prohibition does not appear to change the status quo in Massachusetts (after all, individual notaries do not usually conduct closings in their personal capacity; they work for law firms or companies employed by lenders for that purpose), it is, in fact, the first time that any governmental agency above a trial court level addressed the issue of real estate closing constituting a practice of law.

It is now abundantly clear that one of the intents of the Order is to limit the conduct of real estate closings to only attorneys licensed to practice in Massachusetts. Given the prior trial court decisions on the issue, the provisions of the Good Funds Statute (M.G.L. c. 183, § 63B) entrusting the bank funds only to attorneys, and now the prohibition against non-attorney notaries from conducting closings, one would be hard-pressed to put forth a cogent and persuasive argument in favor of closings conducted by non-attorneys.

Some lenders have made an attempt to get around the involvement of attorneys in closings by the employment of a so-called "witness only signature closing". In this process, a notary (attorney or not) is not allowed to perform any service other than witness and acknowledge the necessary documents.

While the Order does not specifically eliminate this practice, it nevertheless makes clear what the notary may charge for this service. Section 6(a)(6) of the order prohibits the notary from performing a notarial act if: The notary public will receive as a direct or indirect result any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees set forth in section 41 of Chapter 262 of the General Laws or has any financial interest in the subject matter of the document.

In other words, a notary may not be compensated for notarial services other than under M.G.L.c.262, §41. One look at M.G.L.c.262, §41 makes it clear that acknowledgments are not addressed in the fee structure contemplated in that section. One may extrapolate from the lack of any reference to a fee for acknowledgment that this service is to be performed for free (even if one were to accept the fee structure in Section 41 in relation to acknowledgments, this fee would not exceed the grand total of $1.25 per document).

Accordingly, a notary may not charge for the acknowledgment. As a result, any charge for acknowledgment in a "witness-only closing" is a practice prohibited under the Order and thus constitutes official misconduct punishable by revocation of the notary's commission.

Enforcement of the Order

The fact that the Governor's office is serious about the enforcement of its Order is best highlighted by provisions of Section 11 of the Order. Pursuant to this section, each Notary must keep and provide for inspection a journal of notarial acts. The journal must be a permanently bound book that contains numbered pages.

Only one active journal may be kept at the same time. The journal must contain the record of the following: the date and time of the notarial act; the type of the act; the description of the notarized document; the signature, printed name and address of each principal and witness; description of the satisfactory evidence of identity; the fee, if any, to be charged; the address where the act of notarization was performed.

Note that the signature of the principal is a part of the proper entry in the journal. With regard to the evidence of identity, the journal must contain a notation describing the document (including the issuing agency, serial number and date of issuance and expiration) or a statement based on the notary's personal knowledge of the individual.

In addition, if a notary, for whatever reason refuses to perform a notarial act, the notary must record in the journal the circumstances surrounding the refusal.

Any member of the public has a right to inspect the journal, and the record of such inspection or the refusal to allow it must be entered into the journal. If the notary refuses to allow inspection, he or she must enter into the journal the specific reason for such refusal. The journal must be kept for seven years after the expiration of the notary's commission. If a notary changes his or her place of employment, the journal must follow the notary and not remain with the employer.

The above changes are certain to cause a ripple among the conveyancers in the short run.

New document forms must be ordered, seals have to be changed, and journals created. In addition to the highlighted portions of the Order, there are others, some of which are designed to prevent non-attorneys from preying on individuals for whom English is a second language, and others to stop identity fraud.

All law practitioners need to familiarize themselves with the complete text of the Order to fully service their clients and assist their notary staff. Additionally, there are rumors that portions of the Order may be further amended as it applies to the closing process. Nevertheless, the Order as it currently stands serves an important function as it establishes much-needed clear and unambiguous guidelines to the acknowledgment process.

REBA and Lawyers Weekly produce journal for notaries

In response to the governor's executive order concerning notaries, the Real Estate Bar Association for Massachusetts and Lawyers Weekly are producing a notary journal that will meet all the requirements of the new order.

The journal can be ordered from Lawyers Weekly starting today by visiting the online bookstore at http://books.lawyersweekly.com or calling (800) 451-9998. The book will ship in a few weeks.

"Although there are some generic notary journals on the market, some of which claim to be for 'all states,' these journals were not designed with the executive order in mind and fall well short of what the order requires," says Lawyers Weekly Vice President Thomas F. Harrison.

Frequently, Harrison says, "the generic journals are missing a half-a-dozen or more important fields that are specifically required by the order."

Attorney Peter Wittenborg, the executive director of REBA, adds that "to protect themselves, lawyers, secretaries, paralegals and other notaries in Massachusetts must make sure their journal meets all the requirements of the order. The great thing about the journal from REBA and Lawyers Weekly is that if you use it, you can be sure you're in compliance."

The Official Massachusetts Notary Journal will cost $9.95 (plus shipping and handling).