

REBA to launch Housing Court Bar Committee

In response to a request from Housing Court Chief Justice Manuel Kyriakakis and leaders of the Housing Court bar, REBA has been asked to launch a Housing Court Bar Committee

to serve as a forum for lawyers who practice before the Housing Court as well as non-lawyer professionals involved with the five housing courts statewide. One of the group's first's ini-

tiatives will be to commission a portrait of Hon. E. George Daher, chief justice of the Housing Court Department of the Trial Court from 1978 to his retirement in 2002.

In August, over 40 members of the Housing Court bar together with Housing Court staffers crowded into a REBA conference room to make plans to launch this group. The new committee will serve as a "mini-bar association" for practitioners in the Housing Court.

At this initial ad hoc meeting the group elected three interim co-chairs to plan the committee's agenda and programs for the balance of this year and 2006. The co-chairs are: Donna E. Cohen, of counsel to Gilman McLaughlin & Hanrahan LLP, and Maureen E. McDonough, clinical instructor in the Housing Law and Litigation Unit at the Harvard Law School's Hale & Dorr Legal Services Center. Robert G. Fields, clerk-magistrate of the Housing Court Department-Western Division in Springfield, will serve as the court's liaison to the committee.

Housing Court practitioners joining REBA who serve on this committee will receive free membership for the balance of 2005 and dues will be applied to 2006.

For more information about how to join the Housing Court Bar Committee contact Nicole Cohen at cohen@massrelaw.org or (617) 854-7555.

Hon. E. George Daher Portrait Fund



In response to a request from representatives of the Housing Court bar, REBA has agreed to administer a public collection to sponsor and fund a portrait of Hon. E. George Daher to be installed in the Housing Court.

Judge Daher was chief justice of the Housing Court Department of the Trial Court from 1978 until his retirement in 2002. Before being nominated to the bench, Daher practiced law for 13 years.

A graduate of Suffolk University Law School, Daher was recently appointed by Gov. Romney to chair the State Ethics Commission.

Anyone interested in participating in this endeavor to honor Judge Daher may send a check in any amount, The Real Estate Bar Association, payee, to REBA, 50 Congress Street, Suite 600, Boston, MA 02109-4075.

TAVMA LEGISLATION

REBA aggressively opposing measure that would allow non-lawyer closings

The Real Estate Bar Association has launched a grassroots effort to increase public and bar awareness of House Bill 904, the so-called TAVMA legislation. This bill, proposed by the Pittsburgh-based Title/Appraisal Vendor Management Association (TAVMA), would allow non-lawyer corporations to conduct commercial and residential real estate closings in Massachusetts, reversing REBA's hard-fought court victories in the cases of *Closings, Ltd* (1993) and the *Colonial Title and Escrow, Inc.* (2001).

In a recent newsletter to members, TAVMA has described Massachusetts as "a battleground state" in the group's effort to undo recent case law on the practice of law by non-lawyers.

Spearheaded by Thomas Bussone II who chairs the real estate practice of Beverly-based Segal, Edelstein, Bussone & Fallon LLP and Michelle Simons a principal in the Newton firm of Brecher, Wyner, Simons, Fox & Bolen LLP, REBA has met with local, regional and specialty bar associations across the state to opposed this legislation which is sponsored by Rep. Paul Kujawski (D-Webster).

Bussone and Simons have traveled the Commonwealth meeting with bar associations and lawyer groups in Lenox, Springfield, Mansfield, Worcester, Springfield, Plymouth, Salem, Hyannis, Newton and Boston. In addition, they have secured support from the Boston Bar Association and the Massachusetts Bar Association. A website, www.consumersandrealstate.com, has been created as a resource for those interested in learning more about the legislation.

The legislation is also supported by another national trade group, the Real Estate Services Providers Council, Inc. (RESPRO), based in the Washington, D.C. Both TAVMA and RESPRO have engaged Beacon Hill lobbyists and have expended over \$165,000 in lobbying fees alone to advance their legislation.



MICHELLE SIMONS
Helping to spearhead opposition, along with Thomas Bussone II

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REBA's new website promises to be more efficient tool for members

By Susan A. Graham



The first thing I noticed about the REBA website was that it had an incredible amount of information on it. And when I took the time to study the member home page, I found out a lot about REBA, its history and the work that conveyancers do. I discovered how important real estate attorneys are in the grand scheme of things, and how an organization previously called MCA could pull together so many dedicated real estate professionals that they came up with 24 committees!

Wow. I was impressed.

REBA's new website (www.reba.net) – to be launched in early November – will benefit everyone. In three clicks or less, you are at your destination.

But there were so many links to click on that it took me two full days to get a feel for the members' side of the website. Then I found that on the general public page there was no obvious link promoting membership. The home pages were sooo long, plus, it took me five, six or seven links to get to where I wanted.

For the first few months on the job I would dedicate the last hour of each day familiarizing myself with where information was. Now, I'm not an attorney, (you all knew that right?) but I have bought and sold several properties, so I know enough to give Peter, our executive director, a hard time every now and again, but where was

I supposed to find the information about dispute resolution? Members would call looking for a list of the neutral or our fees, and I got real good at small talk while I personally clicked here and clicked there looking. I'd usually give up and fax the information to them.

Then, there are the standards and forms. I'm an organized individual, I like things alphabetized best, but Peter has explained to me that the standards and forms are in the order of their inception, and would not work alphabetically. The REBA staff could benefit from a search tool, though to answer members questions regarding what forms we have and where.

The current website reminds me of a bulletin board, with little *Post-It* notes all over the place, falling over into other sections, and in some places, the same information over and over again. That wouldn't necessarily bother me, but when I noticed two different versions of the same form, I knew something had to be done.

The Website Redesign Committee expects our website to be world-class, organized, (yes, topics in alphabetical order even), have search capabilities, allow you to control your own password, research, sign-up for membership and seminars, pay electronically by VISA, Mastercard or your debit card, plus see all the back issues of REBA News and REBA e-News and MCA Conveyancer.

Members should be able to easily access online member benefits like Citizens Bank's IOLTA program; a discount for a subscription to the Land Court Reporter or Zoning Alert offered by LandLaw publishing; or the new benefit from Sickie Brook Computer Service. You can sign up with Massachusetts Lawyers Weekly for a subscription from our site. The standards and forms will be there, and you will be able to search within them.

As I passed my one-year mark with REBA and I reflect on the great people I'd met and worked with, not to mention everything I've learned, I love the fact that REBA's new website (www.reba.net) will benefit everyone, one that in three clicks or less, you are at your destination.

Please send me any comments or wishes you have for the website, and we will do our best to implement them.

Susan Graham is REBA's chief operating officer. You can reach Susan at graham@massrelaw.org.

3rd Circuit allows complaint against RESPA 'mark-up'

Circuit courts split around the country

By Joel A. Stein



On Aug. 4, the 3rd U.S. Circuit Court of Appeals in *Santiago v. GMAC Mortgage* ruled that "RESPA does not provide a cause of action for overcharges, but does provide a cause of action for mark-ups."

With this decision, the Third Circuit joins the Second Circuit in the case of *Kruse v. Wells Fargo* in contrasting prior decisions by the Fourth, Seventh and


Eighth Circuits, which held that Section 8(b) does not prohibit mark-ups.

Both the *Kruse* court and the *Santiago* court cited the case of *Sosa v. Chase Manhattan Mortgage Court* in which "the Eleventh Circuit found nothing absurd about a conclusion that Section 8 (b) covered mark-ups."

Thus, the settlement service provider who marks the cost of a service provided by a third party vendor and keeps the marked up portion of the charge is violating the second prohibition of Section 8(b) by accepting a portion of the charge for services the settlement service provider did not perform.

Section 8(b) of RESPA states: "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 the transaction involv-

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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
 Website: www.massrelaw.org

Send a letter to the editor!

Peter Wittenborg, Executive Director, REBA, 50 Congress St., Suite 600
 Boston, MA 02109-4075 or wittenborg@massrelaw.com



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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

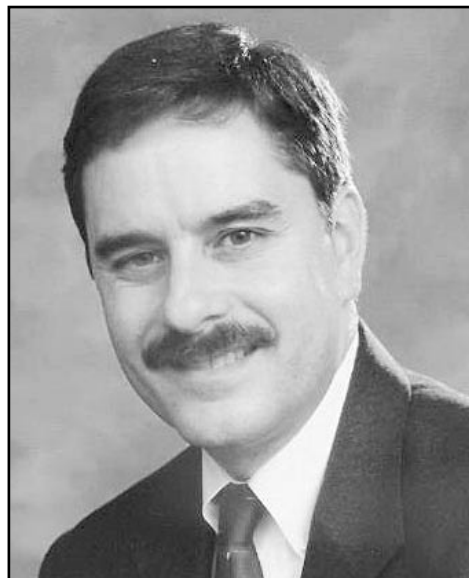
While the Real Estate Bar Association for Massachusetts accepts advertising in its publications and educational offerings, it endorses no products or services.

www.massrelaw.org

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

From the President's desk

By Daniel J. Ossoff



Although my term as president of REBA runs through the end of the calendar year, the publication schedule of *REBA News* dictates that this will be my last chance to communicate with the real estate bar through this forum.

For me, this presents an ideal opportunity to reflect upon just how far the Real Estate Bar Association for Massachusetts has traveled in recent year, to look back on the progress that has been made, and to look ahead to future goals which are now more visible than ever on the horizon.

In a recent conversation, one of my fellow REBA board members expressed the opinion that, having spent a few years on the board, the member was just "getting to know" REBA. To my own surprise, and without having really thought about it before, my immediate response to that comment was that "we are all just getting to know REBA," because REBA, in so many ways, is an entirely different organization than it was just a few short years ago, prior to the implementation of REBA's current strategic plan.

In the days since that conversation, and in preparing to write my last President's column, I have come to appreciate just how accurate my initial reaction to my colleague's comment was. The goal of REBA's strategic plan was to create a stronger bar association, better able to serve the needs of the entire real estate bar. In short, the goal has been to make REBA the bar association of choice for all

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

real estate practitioners in Massachusetts.

Although there is always more to be accomplished, the progress that has been made towards that goal in a relatively short period of time is impressive. I submit for your consideration the following:

Exhibit A – The membership of REBA, and correspondingly the types of activities in which REBA is involved, are more diverse than ever before. We have expanded our committee structure to include new committees in the areas of Leasing, Commercial Real Estate Finance, Land Use and Zoning, Real Estate Litigation, Affordable Housing, and, most recently, Environmental Law.

These new committees continue to bring to REBA a membership that far better represents the entirety of the real estate bar, and with it the ability to provide new educational and networking opportunities for our members along with the expertise and resources to broaden the legislative agenda of the Association.

Exhibit B – While the new committees referred to above have allowed REBA to attract attorneys engaged in practice areas that have not traditionally been a focal point of the organization, our remaining new committee, the Residential Conveyancing Committee, has allowed REBA's leadership to reconnect with a segment of the real estate bar that has long looked to REBA as its primary educational resource and legislative advocate. While it is exciting to see new members in new practice areas becoming involved with the Association, it is every bit as exciting to see the enthusiasm that has been generated within the residential conveyancing bar through the efforts of Marvin Kushner, Tom Bussone, and the entire Residential Conveyancing Committee.

This committee, which was created through the efforts of my predecessor, Chris Kehoe, has insured that while REBA grows and evolves, it will continue to serve effectively the needs of the residential conveyancing bar.

Exhibit C – The fact that you are reading this newsletter in the form of a supplement to *Massachusetts Lawyers Weekly* is just one example of the relationships that REBA has been forming, and will continue to form, to provide increased services to our members. REBA's affinity relationships with Citizens Bank and with Massachusetts Lawyers Weekly are, at this point, well-established and continue to benefit both REBA and its members.

Elsewhere in this edition of *REBA*

News, you will find details of a newly implemented arrangement with Sickle Brook Services, Inc. which will afford computer support services to REBA members at reduced rates. REBA's staff is actively engaged in discussions with other potential service providers who are prepared to offer additional benefits on preferential terms to REBA members.

Exhibit D – REBA members will soon be able to take advantage of a new and vastly improved website. REBA staff members who have been working tirelessly on the design and implementation of the new site are extremely excited about the prospect of providing the membership with a new site that will be much more user friendly (the goal is to be able to navigate to any point on the site in three clicks or less) and far more interactive. As we all know, keeping pace with the technology in this area is not easy, nor is it inexpensive. REBA's initial website, launched not all that long ago, has quickly become outdated and increasingly difficult to use. The Board of Directors felt that it was essential to make a significant investment in a new website that will allow our members to access the many resources of the Association in a searchable format, facilitate electronic transactions between the membership and the "home office" on Congress Street, and present a professional image to the consumers of legal services and other non-members who are looking to find out more about the Association and the services provided by its members.

Exhibit E – The work on the new website is just one example of a project that simply would not have been possible prior to the expansion of REBA's full-time staff as part of the current strategic plan. The professionalism, leadership and energy of Executive Director Peter Wittenborg, Chief Operating Officer Susan Graham, and the remainder of the REBA staff has been absolutely essential in the development of the new website, in the publication of this newsletter, in the formation and implementation of the new committee structure, in the expansion of the business of REBA Dispute Resolution, and in the coordination of REBA's legislative activities, to name just a few areas in which great strides have been made in recent years.

In implementing the strategic plan that resulted in the expansion and re-branding of the organization, REBA's leadership recognized early on that an investment in additional staff would have to be made to ac-

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‘Check 21’

New check clearing law creates concerns for closing attorneys

By Ruth A. Dillingham



Based on a federal statute passed in October 2003, a new check processing procedure came into effect on Oct. 28, 2004.

The statute – Check Clearing Process for the 21st Century or “Check 21” – automates check clearing by creating an electronic image of a check and processing the payment electronically.

This is of particular interest to those involved in real estate closing. Closers (almost exclusively lawyers in Massachusetts) face an unintended consequence of the Act in that they are expected to release large sums of money on the same

Ruth Dillingham is special counsel at First American Title Insurance Co. in Boston. She can be reached at (617) 772-9282.

day as receiving the deposit needed to make those outgoing funds available.

With the arrival of this law it seems prudent to review some of the rules of checks and deposits. It may help to review some definitions and parties to the transactions.

What is a check?

A check is a negotiable demand draft instrument – meaning, it is payable on demand and is drawn on a bank. While a check appears to be immediately payable from the definition, it only provides immediate payment if it is presented, in person, at the bank where the funds are on deposit, subject to verifications that the signature of the maker is genuine and that there are sufficient, collected funds in the maker’s account.

Most checks are not so presented, but are deposited into the account of the payee, and the payee’s bank then begins the process of collecting the funds on behalf of its account holder (the payee). Federal law and regulation establish how long the payee’s depository bank can de-

lay in making the funds represented by the check available to its customer.

These regulations (Regulation J at 12 CFR 210 and Regulation CC at 12 CFR 229) allow for different kinds of checks

The statute will automate check clearing by creating an electronic image of a check and processing payment electronically.

to be treated differently for collection purposes, so knowing what kind of check is deposited makes a difference in when funds become available.

Kinds of checks

A **certified check** is countersigned by an employee of the bank on which the

funds are drawn attesting to the fact that: the check is drawn on depositor’s account; the signature is genuine; the bank has segregated funds of its depositor to pay the check; and the bank will pay the check upon presentment.

A **cashier’s check** is drawn on the funds of the bank’s own account; signed by an officer of the bank; and represents the direct obligation of the bank to the payee.

A **teller’s check** is drawn by the bank on its customer’s account. While a certified check will not “bounce” since the funds have been set aside for presentment of this one instrument, a teller’s check could be dishonored if other withdrawals occur before presentment.

Electronic transfers are the type of transactions permitting immediate withdrawals, such as ATM transactions or use of a debit card at point of sale, or deposits such as direct deposit of salary or benefits.

Wire transfers don’t involve any check, and allow funds to be moved through inter-bank relationships, such as the Federal Reserve. A wire transfer is defined as:

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EXPECT THE STAR TREATMENT

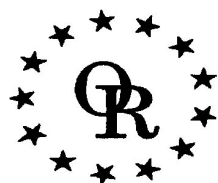


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REBA testifies in support of mortgage discharge reform bill

(Editor's note: Below is the testimony of E. Christopher Kehoe, immediate past president of REBA, at a public hearing on May 18 before the Joint Committee on Financial Services concerning Senate Bill 624, which was prompted by the widespread problem of missing or unrecorded discharges or assignments of mortgages that have in fact been paid off at closings.

Massachusetts mortgage discharge practice has been unable to keep up with the increased volume of residential refinancing, bringing issues of hardship and inconvenience to consumers, and concerns of quality control and liability to lenders and their attorneys.

REBA drafted this comprehensive overhaul of residential real estate mortgage discharge practice in the state. Massachusetts lenders and registers of deeds have had significant input into the legislation. The bill is under review by the Committee on Financial Services, which is chaired by Rep. Ronald Mariano (D-Quincy) and Sen. Andrea F. Nuciforo Jr. (D-Pittsfield). Co-sponsors of S. 624 are Sens. Nuciforo, Robert O'Leary, Scott Brown, and Dianne Wilkerson and Reps. Michael Costello, Robert Coughlin,

Christopher Fallon, David Torrissi, and Philip Travis.

About 30 conveyancers and representatives of the title insurance industry were at the May 18 hearing to express support for the bill.)

Thank you for taking the time today to hear testimony on this important bill.

My name is Chris Kehoe and I am the immediate past president of the Real Estate Bar Association for Massachusetts – an organization consisting of approximately 3,000 members, some of whom are here today.

As you may be aware, the problem of missing and incorrect mortgage discharges is perhaps the most vexing and critical problem that currently affects homeowners' closings in Massachusetts.

Last year I closed approximately 500 residential real estate transactions. I would estimate that two out of every five had a missing or incorrect discharge problem. These problems can prevent consumers from closing loans within their rate-lock period, delay sellers and buyers in the home closing process, and pre-

vent lenders from booking loans on a timely basis.

There now exists in Massachusetts a complicated substructure between title insurance companies and attorneys who are constantly putting band-aids on these problems in the forms of indemnifications and undertakings.

Eventually this whole unregulated and informal system will collapse of its own weight, unless something is done about it soon.

I can give you countless examples of people who have suffered harm as a result of the fact that our current statutory scheme for regulating the discharge of mortgage liens is antiquated and cannot keep pace with the speed of commerce that exists today. The resources expended in this unnecessary process could be more productively used to increase commerce, if the problems could be solved. You have the ability to resolve these problems and REBA's bill is the vehicle to do that.

Three weeks ago, I was working with three brothers who are immigrants to this country. They contracted to purchase a three-family home. I examined the title

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LEGISLATION COMMITTEE

Legislative scorecard

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 at www.state.ma.us/legis.

Priority list

S. 577 Makes execution authority requirements for subordination of mortgage and certain powers of attorney consistent with those for assignment or discharge of mort-

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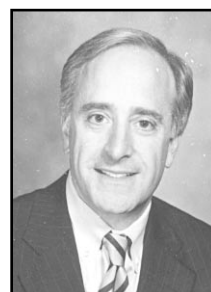
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COMMITTEE ON THE PRACTICE OF LAW BY NON-LAWYERS

Promoting and maintaining professionalism in conveyancing

By Jon S. Davis and Douglas W. Salvesen



Davis



Salvesen

By now, it is settled law that conveyancing – which involves ensuring that title to property is valid, free from all encumbrances, and properly transferred from seller to buyer – requires legal judgment. As such, Massachusetts courts have consistently held that conveyancing can only be performed by those men and women trained in the law.

Home buyers and sellers, as well as lenders, rely on the training, professionalism, and integrity of attorneys to ensure that their property rights are protected. Unlike for-profit corporate closing agents, licensed lawyers are personally subject to the strict ethical and financial oversight authority of the Board of Bar Overseers and the courts of the Commonwealth.

These multiple levels of protection permit Massachusetts buyers, sellers and lenders to confidently and reliably close loans worth hundreds of thousands of dollars every day.

Through the Rules of Professional Conduct, lawyers are charged with the responsibility of helping to assure that the public is protected by having only lawyers practice law. REBA's Committee on the Practice of Law by Non-Lawyers exists to help REBA members meet these professional obligations. The committee is a critical part of REBA's mission of promoting and maintaining the high professional and ethical standards of the members of the real estate bar.

Jon Davis, a partner at Stanton & Davis in Marshfield, is chair of REBA's Committee on the Practice of Law by Non-Lawyers. Jon can be contacted at (781) 834-9181 or at jondavis@stantondavis.com.

Doug Salvesen, a partner at Yurko & Salvesen in Boston, serves as counsel to REBA's Committee on the Practice of Law by Non-Lawyers. Doug can be contacted at (617) 723-6900 or dws@bizlit.com.

Tracking down unauthorized practice of law

The committee is actively engaged in identifying activities that constitute the unauthorized practice of law and, where appropriate, referring matters to governmental agencies to investigate and eliminate clear violations by non-lawyers.

Furthermore, REBA and other bar associations have statutory standing to sue to enjoin the unauthorized practice of law. REBA, largely through the efforts of the committee, has filed two such lawsuits: *Massachusetts Association of Bank Counsel, Inc. v. Closings, Ltd.* (Suffolk Superior Court, C.A. No. 90-3053-C); *Massachusetts Conveyancers' Association, Inc., et al. v. Colonial Title & Escrow, Inc., et al.* (Suffolk Superior Court, Civil Action No. 96-2746-C). In both cases, the court enjoined the defendants from activities constituting the unauthorized practice of law.

The committee was also involved in drafting the Standards of Conduct for Notaries Public by the Governor's Office (Executive Order No. 455). The Standards explicitly provide that a "notary public who is not an attorney licensed to practice law in Massachusetts, or who is not directly supervised by an attorney, shall not conduct a real estate closing and shall not act as a real estate closing agent." The Executive Order effectively prohibits the practice of witness-only closings by non-lawyers, sometimes found outside of Massachusetts.

Currently, members of the committee are actively engaged in REBA's ongoing efforts to fight House Bill 904, the "TAVMA Legislation," which would permit corporations instead of lawyers to handle residential and commercial real estate closings.

Resource for members

As REBA members know, real estate law is a dynamic and evolving discipline.

Today, even "simple" conveyances of residential real estate require the parties to execute and to understand dozens of legal forms, many replete with dense legalese. The traditional boundaries that mark the distinction between the practice of law and other professional disciplines often are hard to delineate.

Members are encouraged to report instances of the unauthorized practice of law by non-lawyers or instances where non-lawyers hold themselves out as practicing law. Also, members who seek some guidance determining the line between the practice of law are encouraged to contact the committee.

What to do with those pesky SPAM e-mails

By Barbara Dove



Spam is a problem for individuals and companies impacting users on all platforms. In order to better understand what it is and how best to prevent it, I contacted my network of Computer

Service companies and consultants. I've summarized their recommendations in this article.

Spam is probably one of the biggest threats and inconveniences there is today. It's causing numerous hours of non-productive work for all e-mail users on all platforms. Individuals can experience a few to hundreds of unwanted e-mails a day depending on their use of the Internet. For a business spam can cause

Barbara Dove is the president of Sickie Brook Computer Services, providing remote computer solutions for large and small businesses. You can contact her at barbarad@sicklebrook.com.

an increase in bandwidth use, eat up more disk space, and sometimes stop servers all together.

Prevention is the best way to reduce spam. In my survey of technology companies most recommended creating an address to use when purchasing a product or to be added to a newsletter.

Yahoo and Hotmail offer free accounts that are good for this purpose. This keeps your routine e-mail address private and not as accessible to spammers.

The second common recommendation was to look for spam in your e-mail and delete it before opening it. If you use MS Outlook, turn off the view screen so the e-mail isn't opened. Delete what you don't recognize and read the e-mail from those you know.

If you have an additional address, forward any questionable e-mail to that address and deal with it there.

Never respond to a spammer's request to be deleted from a list unless you are certain the message comes from a legitimate source. This is a confirmation that the e-mail address belongs to you and will make you an ongoing target for future spam.

Don't ever give personal information in an e-mail. If there is a request from the bank, call to verify the need. Look for the

padlock in the lower right corner indicating a site is secure when providing credit cards.

Computer help desk service now available as new member benefit

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HUD REPORT

Association represented at RESPA reform roundtable

By Joel A. Stein



The Department of Housing and Urban Development has staged a series of roundtables on proposed changes to HUD's regulations under the Real Estate Settlement Procedure's Act.

On Aug. 18, Richard Hogan, regulatory and legislative counsel of CATIC, and I attended the fourth roundtable on behalf of REBA at the HUD headquarters.

HUD Secretary Alphonso Jackson did not attend our meeting but spoke from a remote location and emphasized that reform was necessary and that industry input would play a part in the final rule.

A former president of the Association, Joel Stein chairs the Title Insurance and National Affairs Committee of REBA. He practices with Friedman & Stein, P.C. in Braintree. Joel can be reached at (781) 848-8411.

Jackson further noted that it is "not how fast we do it, but to do it the right way."

He said that home ownership should be a reality for all families and that HUD intended to take input from Congress, industry groups and consumers. He assured us that a rule does not exist in a "secret drawer."

Gary Cunningham, the HUD deputy secretary for regulatory affairs and manufactured housing, reviewed two new HUD forms, the Mortgage Package Offer (MPO) and Revised Good Faith Estimate (GFE). To a packed audience of mortgage brokers, surveyors, consumer advocates, mortgage lenders, escrow agents and at least two attorneys, Cunningham noted that HUD's four goals for RESPA reform were simplicity, clarity, transparency, and a greater certainty of cost. It was noted at several times throughout the proceedings that savings for consumers was not included in HUD's stated goals.

The proposed GFE form includes four pages. The first page includes borrower information, instructions on how to use the GFE, a summary of loan terms and

a summary of total estimated charges. The terms and conditions of the GFE are valid for ten business days.

The loan information includes whether the loan is a fixed loan rate, or an adjustable loan rate; the interest rate; the loan term; and the monthly payment for principal, interest and mortgage insurance. There was support at the meeting to create a GFE which would match the HUD-1 form so the consumers could easily compare the two documents at closing.

The second page notes origination charges (including yield-spread premium and discount points disclosure), short descriptions of settlement charges, and total estimated charges. Settlement charges include title services and lender's title insurance, taxes and fees, reserves or escrow daily interest charges, homeowner's insurance and optional owner's title insurance.

There are also categories for "required services that we select" and "required services that you can shop for." These services would include, but are not limited to, credit, survey and appraisal. The second

page also includes the lender's charges for loan origination. The service charge listed under "Your Charges for Loan Origination" does not require itemization.

The third page of the 2004 GFE form includes a description of tolerances, a chart describing the effect of higher or lower interest rate on settlement charges and an explanation of how long the costs provided in GFEs remain unchanged. The description of tolerances allows for the sum of third-party charges to have a 10 percent tolerance, rather than applying the 10 percent rate to each individual third-party charge as required in the previous HUD proposal.

The fourth page of the GFE form consists of a shopping page allowing consumers to easily compare different loan offers.

The 2004 HUD proposal includes a Mortgage Package Offer (MPO), rather than a Guaranteed Mortgage Package Agreement (GMPA), which was proposed in 2002. Cunningham said "In 2004, to qualify for safe harbor from RESPA Section 8, a mortgage packager

Continued on page 9

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Continued from page 8

must have provided a guaranteed price for most settlement services necessary to close the loan, and an interest rate that is fixed or would have changed only according to posted pricing."

The MPO provides a guaranteed price open for 10 days, allows a nominal up-front fee and requires the packager to indicate whether the package included certain services.

The MPO form is four pages. The first page includes borrower information, instructions on how to use the MPO, summary of loan terms and summary of guaranteed estimated charges.

The form is similar to the first page of the GFE form. The second page notes that the services contemplated to be included in the 2004 MPO package are appraisal, credit report, government charges, title insurance and closing services, mortgage insurance, survey and pest inspection. Optional owners' title insurance is also included, as is a checklist as to which services are included in the package.

The third page of the MPO includes a chart describing the effect of higher or lower interest rates on settlement charges and an explanation of how an MPO can be accepted. The fourth page is similar

to the fourth page of the GFE form and operates as a shopping page, allowing consumers to compare different loan offers. In 2002, interest rates could change only based on a publicly available index. In 2004, interest rates could change based only on posted pricing.

Hot topic

The yield spread premium disclosure was an extremely hot topic with mortgage brokers and consumer advocates. In 2002, yield spread premium and discount points would have been disclosed as "interest rate dependent payment."

In 2004, they are listed as a "credit or charge for the specific interest rate chosen." In the GFE as contemplated in 2004, the amount listed in Section 1 for brokers will include all fees received for loan origination, including any payments from the lender to the broker.

The mortgage brokers argued that including yield spread premiums on the mortgage forms will make it appear to the consumer as though brokers are more expensive, even though that may not be the case. The consumer will see extra fees listed under the broker charges and fewer fees listed with the lender's charges, so they perceive that the loan they would get with the lender would be less expensive. Consumer groups draw

a distinction between the role of a mortgage broker and the role of a lender, stressing that a consumer believed that a mortgage broker was working for them and that the mortgage broker's charge should be made clear.

At our roundtable, there did not appear to be much support for the Section 8 exemption. I specifically questioned HUD's representatives as to why the Section 8 exemption should be considered pro consumer when the original impetus for RESPA was to combat kickbacks and why is it necessary when lenders are already in the position to offer guaranteed mortgage packages.

Further, HUD should be vigilantly supervising RESPA violations, rather than making it easy for the marketplace to engage in those violations. Last, why should packagers be allowed to push down costs from settlement service providers and then retain the savings, rather than pass it along to the consumer?

The response was that a competitive marketplace would drive down prices and regulate the consumer issue. Cunningham further noted that all RESPA enforcement was done out of Washington, D.C. and was a "high priority of the Department." A further comment from another attendee that "with packaging,

you are going to have the wolf guarding the chicken coop" seemed more appropriate.

In 2004, HUD has developed a settlement service package which would be used in conjunction with the GFE or MPO. The settlement service package would include title services, government recording fees and transfer charges and other lender required settlement services that the borrower could choose.

Cunningham noted that providers could include title insurers, lenders, escrow companies, mortgage brokers, real estate firms, title agents, pest inspectors, surveyors and attorneys. The settlement service packager must provide a guaranteed lump sum price for charges and services within the settlement service provider and it would be marketed to the MPO packager or the consumer.

HUD has made statements that they would not be taking "pen to paper to work on a proposed Rule until September." I do not know the form of this proposed Rule. However, it appears that RESPA officials are genuinely concerned with making forms that are more easily understood by consumers, some form of packaging and some different treatment of the yield spread premium.

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Annual Meeting Seminar 2005

Wyndham Westborough Hotel
5400 Computer Drive
Westborough, MA 01581

Monday, November 14, 2005
8:30 a.m. – 4:00 p.m.



THE MORNING SESSIONS

Relocating Easements After
M.P.M. Builders v. Dwyer

Recent Changes in State Wetlands
Regulations and Enforcement

Zoning Tear Downs

Foreclosure, Nuts and Bolts

Developing a Business Plan

Part 1: Defining and Branding
the Practice You Want

Part 2: Making Your Practice
Profitable

THE AFTERNOON SESSIONS

Recent & Pending Legislation: Summary
and Highlights

Recent Developments in
Massachusetts Case Law

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KEYNOTE SPEAKERS

TAVMA Legislation... House Bill 904

Special Presentation by REBA Residential Conveyancing Committee

As a keynote presentation REBA's
Residential Conveyancing Committee
will offer a brief PowerPoint present-
ation and discussion on House Bill 904,
pending legislation that would permit
non-lawyers to close residential and
commercial loans in Massachusetts. This
legislation would reverse the
Association's hard-fought victories in
the *Closings, Ltd* and *Colonial Title and
Escrow* litigation.

Representatives will include John A.
"Jack" Brennan, an attorney and prin-
cipal in The Brennan Group, special
legislative counsel engaged by REBA
to fight H.904. Representatives from
the Residential Conveyancing
Committee include Michelle Simons,
a partner in the Newton firm of
Brecher, Wyner, Simons, Fox & Bolen
LLP and Thomas Bussone II who
chairs the real estate practice at

Beverly-based Segal, Edelstein
Bussone & Fallon LLP.

Simons and Bussone have spear-headed
the Association's grassroots efforts to in-
crease both bar and public awareness of
H. 904 by speaking at local and regional
bar associations and other groups across
the Commonwealth.

Edward J. Smith, long-time outside legisla-
tive counsel for REBA will also participate.

REGISTRATION for REBA'S Annual Meeting Seminar, November 14, 2005

Complete this form, include the appropriate fee and return to REBA Educational Foundation,
Attn: 2005 Annual Meeting Seminar, 50 Congress Street, Suite 600, Boston, MA 02109-4075
or FAX to: (617) 854-7570.

		By 10/31	After 10/31
_____	YES, please register me. I am a REBA member in good standing.	\$ 135	\$ 160
_____	YES, please register me as a guest.	\$ 175	\$ 200
_____	YES, my firm/organization wants to reserve ____ tables (seats 10). Firm/organization name _____ (Please attach registration form for each person at the table)	\$ 1,350	\$ 1,600
_____	NO, I am unable to attend, but would like to purchase the seminar materials and an audiotape of the sessions. (Order by 11/14/05. Please allow four to six weeks for delivery.)	\$ 130	\$ 130
	TOTAL	\$ _____	\$ _____

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BREAKOUT SESSION PREFERENCES: please rate (1-5) order of your preference:

- _____ Relocating Easements After *M.P.M. Builders v. Dwyer* (Bloom, O'Donnell, Rabadjija)
- _____ Recent Changes in the State Wetlands Regulations and Enforcements (Ricci, Nylen, Gollodge)
- _____ Zoning Tear Downs (Cutler)
- _____ Foreclosure, Nuts and Bolts (Karas, Nolan)
- _____ Developing a Business Plan Part 1 and 2 (Twining, Weitzel)

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Westborough, Massachusetts

Monday, November 14, 2005
8:30 a.m. – 4:00 p.m.

8:30 a.m. - 4:00 p.m.

9:00 a.m. - 12:45 p.m.

9:00 a.m. - 9:45 a.m.
10:00 a.m. - 10:45 a.m.

9:00 a.m. - 9:45 a.m.
10:00 a.m. - 10:45 a.m.

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11:00 a.m. - 11:45 a.m.

10:00 a.m. - 10:45 a.m.
11:00 a.m. - 11:45 a.m.

11:00 a.m. - 11:45 a.m.

12:00 p.m. - 12:45 p.m.

12:00 p.m. - 12:45 p.m.

12:45 p.m. - 2:20 p.m.

1:20 p.m. - 1:40 p.m.

1:40 p.m. - 2:00 p.m.

2:00 p.m. - 2:20 p.m.

2:20 p.m. - 2:30 p.m.

2:30 p.m. - 4:00 p.m.

2:30 p.m. - 3:00 p.m.

3:00 p.m. - 4:00 p.m.

Registration and Exhibits Open

THE MORNING SESSIONS

Relocating Easements After *M.P.M. Builders v. Dwyer*,
Edward M. Bloom, Esq., Kathleen O'Donnell, Esq. and Neven Rabadjija, Esq.

To the benefit of property owners seeking to develop or redevelop property, the Supreme Judicial Court recently changed the common law of Massachusetts regarding the relocation of easements. Formerly, a burdened property owner did not have any right to relocate an easement without the consent of the benefited easement holder. Under the SJC's new ruling, a burdened property owner may relocate an easement if the relocation meets certain criteria and if the burdened property owner takes certain steps with the benefited easement holder. In this session, the elements of this new common law rule as articulated in *M.P.M. Builders v. Dwyer* will be reviewed. Following this review, the panel will discuss the methods for seeking relocation of three typical easements in light of this new rule: a private easement (e.g., for access or running utility lines to an abutting lot), a utility company easement (e.g., for gas or electric lines), and a municipal easement (e.g., for water or sewer lines).

Recent Changes in the State Wetlands Regulations and Enforcement
Heidi Ricci, Mass Audubon; Richard (Chip) Nylen, Jr.; Robert Golledge, Dir. DEP

The panel will discuss the recent revisions to the Massachusetts Wetlands Protection Act Regulations, including new procedures and standards, as well as the strengthening of enforcement provisions. There are new rules for what is a riverfront, how to measure the 200-foot area from a river bank, where a river ends at the ocean, and what is exempt from control in a riverfront; what is automatically acceptable in the buffer zone of wetlands, including new, streamlined approval procedures for work in the outer 50 feet; and who has standing to request a superseding order or determination from a DEP regional office or an adjudicatory hearing at the Division of Administrative Law Appeals (DALA). The panel also will highlight some recent court decisions on municipal wetlands bylaws, especially on mandatory wetlands setbacks for development projects.

Zoning Tear Downs
Judith Chanoux Cutler, Esq.

More and more communities are faced with tear downs of older, smaller residences and the building of significantly larger homes on small lots. This process known as McMansionization causes some neighbors and other community members concern in that the new homes appear out of place when compared to the rest of the neighborhood. Come hear the pros and cons associated with this situation, how some communities and resident groups have attempted to address the "problem", and how different builders' groups have challenged those actions.

Foreclosure, Nuts and Bolts
Melvin A. Karas, Esq; Francis J. Nolan, Esq.

The panelists will discuss the necessary steps to complete a Massachusetts mortgage foreclosure, including the Servicemembers Civil Relief Act, the role of the Land Court in the foreclosure process and the notice provisions of M.G.L. Chapter 244. The panelists will also discuss the effect of the documentation typically recorded with the Registry of Deeds after foreclosure.

Developing a Business Plan Part 1 and Part 2 (Part 2 continues at 12:00)
Part 1: Defining and Branding the Practice You Want
Peter P. Twining, Esq.; Philip Weitzel, CPA

"Oh, you're an attorney?" The law practice marketing moment and opportunity! Be sure that you are prepared and can capitalize on it. Join us to learn how to develop the business plan that will achieve this.

Developing a Business Plan Part 2: Making Your Practice Profitable
Peter P. Twining, Esq.; Philip Weitzel, CPA

Make smart decisions to maximize after-tax profits on all that business you have generated. In this session you will learn about budgeting, tax planning and other financial aspects of running your practice.

The Exhibitors Hour or Demo of REBA's New Website

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Luncheon

REBA President's Remarks
Daniel Ossoff, Esq., President

Keynote Presentation on House Bill 904:
Tom Bussone, Michelle Simons, Jack Brennan

REBA Business Meeting

Clerk's Report
Treasurer's Report
Committee Reports

Refreshment Break and Exhibits

THE AFTERNOON SESSIONS

Recent & Pending Legislation: Summary and Highlights;
Robert H. Kelley, Esq. and Edward J. Smith, Esq.

Recent Developments in Massachusetts Case Law
Philip K. Lapatin, Esq.



GENERAL INFORMATION

- Premium credit for professional liability insurance may be given for attending properly documented continuing legal education programs.
- Continuing Legal Education credit can be made available in other New England states. Contact the Real Estate Bar Association (REBA) for specific details.
- Registration for REBA's 2005 Annual Meeting Seminar is open to REBA members/associates in good standing and their guests and non-members/associates (for an additional fee). Everyone attending the REBA 2005 Annual Meeting Seminar must register. The Registration Fee includes the cost of the morning and afternoon sessions, the seminar written materials and the luncheon. We are unable to offer discounts for persons not attending the luncheon portion of the program.
- Please submit only one registration form per person. Additional registration forms are available at our website@ www.massrelaw.org or by emailing Nicole Cohen at cohen@massrelaw.org. Confirmation of registration will be sent to all registrants by email or mail.
- Registrations with the appropriate fee should be sent by mail or fax to arrive prior to October 31, 2005 to guarantee a reservation at the Annual Meeting Seminar. Registrations received after October 31, 2005 are subject to an additional processing fee of \$25. Registrations cancelled in writing before October 31, 2005 will be honored, but charged a \$25.00 processing fee. No other refunds will be permitted. Registrations cancelled in writing on or after October 31, 2005 will not be honored but substitutions of registrants attending the program are welcome and may be made at any time. Written materials will automatically be mailed to "No Shows" within four to six weeks after the program.
- The use of cell phones and pagers is prohibited in the meeting rooms during the programs.

REBA testifies in support of mortgage discharge reform bill

Continued from page 5

to the property and it was encumbered by an incorrectly discharged mortgage. The mortgage was given by the seller to a mortgage corporation when the seller purchased the home.

The mortgage corporation transferred the loan to an out-of-state lender. The seller paid off the lender a couple of years ago in connection with a refinance and the lender proceeded to record a discharge of the mortgage. However, the mortgage corporation had never recorded an assignment of the mortgage to the lender, therefore, the discharge that was issued by the lender was incorrect.

They were not the holder of record. Unfortunately, the mortgage corporation went out of business a few years ago, and the only way to cure this problem is to revive the corporation to issue an assignment of mortgage, or to go to Land Court and ask for an order extinguishing the mortgage. Both of these procedures take time, cost money and waste resources.

I contacted one of my friends at a title

insurance company and they agreed that we could proceed with the closing, provided we escrow \$25,000 pending the seller's resolution of the problem. The seller's initial reaction was to delay the closing a week to look into the matter. After a week, the seller agreed the problem could not be solved quickly, and got an estimate from a lawyer who said that for \$5,000 the problem could be resolved by court action, since they were unable to revive the corporation.

The title company required that we double the amount of the estimate, so my office is now holding \$10,000 pending resolution of this problem. This caused a significant amount of stress to the buyers' families and delayed their move into the property.

It caused even more stress to the sellers who were not able to complete their sale on time.

Our proposed legislation would offer several solutions to this problem, including allowing the attorney who paid off the loan to discharge it by affidavit, or to record a paid note as evidence of the discharge. Either solution would

cost \$75.

The refinance boom of the last several years has done nothing but exacerbate this problem. I have personally closed with the same borrower as many as six times in two years and each time I conduct a closing, I am looking for a missing discharge from the prior closing.

These are examples and I can give you countless others.

Our bill requires lenders to either record or provide a mortgage discharge within 45 days and we propose modest penalties for those lenders who do not.

It's time for lenders and servicers to step up and either properly clear the record title for their borrowers or pay the price for their failure, neglect or refusal to do so. We have even provided a means for them to shift the burden away from themselves by not charging a borrower for recording the discharge, and, instead, sending a properly executed and documented discharge to the closing attorney to record. If they do that, they're absolved of responsibility. If they don't do that, and continue to neglect

or refuse to do so after demand, then they are liable for penalties.

I want to stress that the problem here is not created by Massachusetts lenders. I recently had a situation with a local bank involving a missing discharge. I called the bank, faxed them a copy of the payoff and the very next day, I had a discharge. Massachusetts lenders are not the problem.

Last year I testified before this committee that I requested a discharge from a company in California that had been paid off years before. They told me that the laws in Massachusetts don't apply to them because they were in California. I think the time has come for our Legislature to send a message to out-of-state lenders that they need to be careful with the titles to the homes owned by consumers in Massachusetts.

In Florida, there are criminal sanctions for failure to record a mortgage discharge. In South Carolina, the penalty is up to one-half of the outstanding mortgage amount. I guarantee to you that

Continued on page 14

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Legislative scorecard

Continued from page 5

age. **Status:** Joint Committee on Financial Services (REBA position: support)

S. 624 REBA's omnibus mortgage discharge reform bill. **Status:** Joint Committee on Financial Services (REBA position: support)

S. 894 Facilitates registration at the Land Court of instruments executed on behalf of a corporation. See also H. 793. **Status:** Joint Committee on the Judiciary (REBA position: support)

S. 921 Enacts a good and clear record and marketable title act. See also H. 762. (Landowners Title Protection Act). **Status:** Joint Committee on the Judiciary (REBA position: support)

S. 1891 Proposes 50-year statute of limitations under G.L. 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. 2104 Authorizes the recovery of attorneys' fees in the enforcement of certain conservation-related and affordable housing restrictions by municipalities and others empowered to bring enforcement actions. **Status:** Joint Committee on the Judiciary (REBA position: support)

H. 795 Establishes a 50-year limitation on sand rights and other profits à prendre, 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 (REBA position: support)

H. 904 Permits certain corporations to perform real estate closings, notwithstanding statutory prohibition on the practice of law by non-attorneys. **Status:** Joint Committee on the

Judiciary hearing pending (REBA position: opposed)

H. 2606 DOR "tax loop-holes bill" bill. See also H. 21. Includes provisions: (a) to apply the deeds transfer excise tax to transfers of less than fee title interests in real estate and transfers of controlling interests in any entity that holds real estate. **Status:** Passed by the House and Senate. See H. 4169, S. 2156 (See below). (REBA position: opposed); (b) to establish a lien on other taxpayer real property in the case of grantor trusts and "disregarded" entities. **Status:** Passed by the House and Senate with REBA amendment to require identification of the particular record title holder on such state tax liens. See H. 4169, S. 2156 (See below); (c) to extend six-year duration of recorded liens for child support to 10 years, subject to extension, consistent with the duration of state tax liens. **Status:** Passed by the House and Senate. See H. 4169, S. 2156. S. 2156 now before House Ways and Means Committee, pending the appointment of a Joint House-Senate Conference Committee.

Other legislation

S. 149 Relative to smart growth zoning and housing production. **Status:** Joint Committee on Housing jointly with the Joint Committee on Community Development & Small Business.

S. 166 Livable Communities Act. **Status:** Joint Committee on Community Development & Small Business.

S. 168 Proposes a Massachusetts Land Use Reform Act. See also H. 3544. **Status:** Joint Committee on Municipalities & Regional Government jointly with the Joint Committee on Community Development & Small Business.

S. 859 Establishes a Western Division of the Land Court, sitting in Worcester. **Status:** Joint Committee on the Judiciary.

S. 917 Creates an estate of homestead by operation of law and without the need for a recorded instrument. See

Continued on page 14

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REBA testifies in support of mortgage discharge reform bill

Continued from page 12

there are no mortgage discharge problems in either one of those states.

Our bill will also deal with the problem created when banks merge or are acquired by another lending institution. Right now it is necessary to record certificates of merger and succession in order to validate discharges. Our bill would require that matters of merger and succession be stated in the mortgage discharge document and that they may be relied on without further evidence of corporate merger or consolidation.

Another key provision of our bill would streamline the discharge by affidavit statute, which is currently too complex to be workable. We have provided a notice provision to the lender in order to safeguard the rights of lenders under these circumstances.

Our bill also provides an expanded opportunity to obtain a judicial discharge by petition to the Land Court or Superior Court. We also seek to reduce the 50-year statute of limitations for enforcement of a mortgage to 35 years from the recording of the mortgage or five years after the term of the stated maturity date within the mortgage, unless an extension is filed prior to the expiration of such period.

Recently, I had a lender say to me that the problem of missing discharges is costing lenders money because they can't get deals closed in a timely manner.

We at REBA want to work in good faith with all the parties affected by this – lenders, real estate brokers, title insurers and attorneys – to stabilize and safeguard the most important asset owned by consumers in Massachusetts. Please help us do this. Thank you.

Legislative scorecard

Continued from page 13

also S. 856. **Status:** Joint Committee on the Judiciary.

S. 922 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. 763. **Status:** Joint Committee on the Judiciary. (REBA position: support).

S. 923 Legislation relative to notice of contract under G.L. c.254 and dissolution of mechanics liens. See also H. 764. **Status:** Joint Committee on the Judiciary.

S. 1078 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 of 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. 1169 Expands zoning protection for lawful, non-conforming single-family and two-family dwellings. **Status:** Joint Committee on Municipalities & Regional Government

S. 1171 Legislation to relax the statute of limitations for use violations under G.L. c. 40A, § 7. **Status:** Joint Committee on the Judiciary.

S. 1245 Sustainable Development Act. **Status:** Joint Committee on Environment, Natural Resources & Agriculture.

H. 648 Omnibus revision of the Massachusetts Homestead Act. **Status:** Joint Committee on the Judiciary.

H. 737 Relative to the Uniform Durable Power of Attorney Act. **Status:** Joint Committee on the Judiciary.

H. 739 Relative to the spousal elective share. **Status:** Joint Committee on the Judiciary.

H. 808 Filed by the State Secretary, legislation to authorize the use of electronic notarization of instruments. **Status:** Joint Committee on the Judiciary.

H. 853 Establishes a recitation of statutory powers for fiduciaries having legal title to or control over real or per-

sonal property for which there are environmental issues requiring action by the fiduciary. **Status:** Joint Committee on the Judiciary.

H. 956 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 as drafted).

H. 1823 Provides for a stay of mortgage foreclosure proceedings in any action filed during, or within 90 days after, a service member's active duty in the armed forces when the service member's ability to comply with the obligation is materially affected by active duty in the armed forces. **Status:** Joint Committee on the Judiciary.

H. 1838 Provides for a \$100 fine for a mortgagee to fail to record a discharge upon receipt of the mortgage payoff. **Status:** Joint Committee on the Judiciary.

H. 3553 Legislation to relax the statute of limitations for use violations under G.L. c.40A, §7. **Status:** Joint Committee on the Judiciary.

H. 3748 Proposes adoption of the Uniform Real Property Electronic Recording Act. **Status:** Joint Committee on the Judiciary.

The legislative status report was compiled by Robert H. Kelley, chair of the REBA Legislation Committee, and Edward J. Smith, REBA legislative counsel.

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3rd Circuit allows complaint against RESPA 'mark-up'

Continued from page 2

ing a federally related mortgage loan other than for services actually performed."

Santiago's complaint alleged that in January 2002, he obtained a loan for his home from GMAC. In connection with this loan, GMAC charged and collected fees from Santiago for settlement services, including an \$85 tax service fee, a \$20 flood certification fee and a \$250 funding fee.

GMAC fully disclosed these charges to Santiago, who alleged that GMAC retained third-party vendors to perform the tax and flood certification services, and charged Santiago more for these services than for the amount paid by GMAC to the vendors. In addition, Santiago alleged that the reasonable value of the funding service was \$20, and GMAC charged Santiago more than that amount for providing the service or "overcharged" for the service.

In its discussion, the 3rd Circuit considered whether the statute clearly and unambiguously allowed Santiago's claims. The court stated: "If the statutory language is unclear, however, then we

must decide whether to defer to the interpretation of the administrative agency, in this case, the Department of Housing

The law in Massachusetts is undecided, although HUD continues to emphasize that fees cannot be marked up by a lender or title agency.

and Urban Development (HUD) as reflected in the Real Estate Settlement Procedures Act's Statement of Policy 2001-1 66 Fed. Reg. 53,000 052 (2001)."

On the issue of overcharges, the court ruled that the analysis of the statutory text demonstrates that Section 8 does not provide a cause of action for overcharges. The court rejected Santiago's argument that Section 8 applies to overcharges because it prohibits the accept-

ance of "any portion, split or percentage of any charge" for the rendering of services "other than for services actually performed."

The court found that if the section is read as a whole, such a meaning becomes "absurd," and "because the plain language of Section 8(b) does not provide for a cause of action for overcharges, "it is not necessary for us to reach the question whether HUD's interpretation warrants deference."

Cause of action for mark-ups

The court further decided that the text of Section 8(b) allows for a cause of action for mark-ups, noting that the title of Section 8 of RESPA is "Prohibition Against Kickbacks and Unearned Fees." And Section 8(a) is titled "Business Referrals" and prohibits the acceptance of any fee, kickback or thing of value" while Section 8(b) is titled "Splitting Charges" and prohibits the acceptance of "any portion, split or percentage of any charge."


The court further notes that in a kickback arrangement, the consumer would pay a settlement service provider \$100

for a service, who in turn would give a third-party vendor \$100 for that service and the third-party vendor would return \$20 to the settlement service provider as a kickback for the referral of service.

In a mark-up arrangement, the consumer still gives the settlement service provider \$100 for a service, but the settlement service provider keeps \$20 and pays the third-party vendor \$80 for the service. In each scenario, the borrower has been charged \$100, the settlement service provider has earned \$20 for a service it did not provide and the third-party vendor has earned \$80 for a service it did provide.

The District Court's dismissal of Santiago's cause of action for mark-ups was reversed and remanded for further proceedings.

There has been no immediate comment from either HUD or GMAC. At this point, the law in Massachusetts is undecided, although HUD continues to emphasize that fees cannot be marked up by a lender or title agency, unless additional services are rendered to justify the extra costs.



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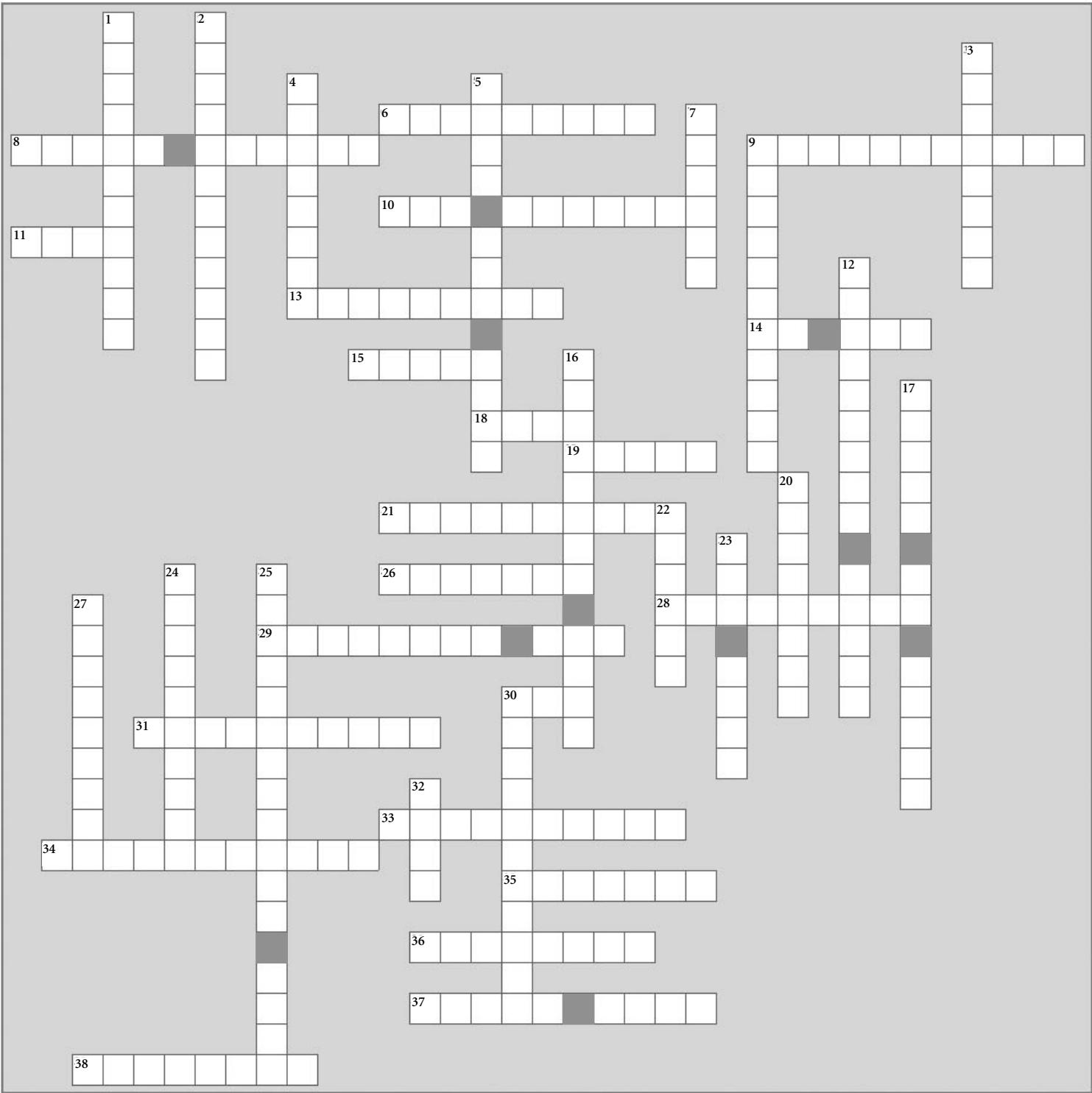
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3. Void; of no effect; invalid
4. Warranty deed subject to defeasance
5. Permits action to be taken after the point when it should have been performed, giving it retroactive effect
7. The condition of legally owning and possessing realty
9. A system of separate ownership of individual units in multi-unit projects
12. A title that will prevail over another title asserted against it
16. When in the same conveyance an estate for life is given to the ancestor with remainder to the ancestor's heirs
17. Any matter appearing in the record of a title to real estate that reflects the existence of an outstanding claim or encumbrance
20. A bar which precludes a party from denying the truth of his deed
22. A gift or bequest by will of personal property
23. A conveyance by deed or will to a person and the heirs of his body
24. A voluntary denial or repudiation of a person's claim to a devise
25. An heir who was born after a decedent executed his will but before he died
27. Able to be terminated at the maker's discretion
30. An attempt by the American Law Institute to present an orderly statement of the general common law
32. An instrument in writing which conveys an interest in land from the grantor to the grantee

See page 19 for solution.

ACROSS

6. A person having a legal duty to act primarily for the benefit of another
8. A search made through the records maintained in the public record office to determine the state of a title
9. Court-appointed custodian of property belonging to a person determined unable to properly manage his property
10. A pending lawsuit
11. To adjoin; to border on; to touch boundaries
13. Not fully completed or accomplished; not vested
14. A proceeding taken against property without reference to the title of individual claimants
15. Property real or personal held by one party for the benefit of another
18. A writing acknowledging a debt and promising payment
19. An agreement whereby one party relinquishes his right to immediate possession of property while retaining legal ownership
21. Property subject to a security interest
26. Monetary compensation which the law awards to one party injured by the action of another

28. Removal or extinction of a legacy
29. Legislative enactment that gives appropriate officials the power to take certain actions
30. the thing
31. Insolvency
33. Subject to revocation upon the occurrence or non-occurrence of certain conditions
34. A clause in any instrument of conveyance which creates a lesser estate or some right interest or profit in the estate granted by the grantor
35. To make known explicitly and in declared terms
36. That clause of the deed which names the grantee and limits and defines the estate to be granted
37. A dividing wall between two adjoining land owners
38. A voluntary transfer of title or possession from one party to another

DOWN

1. Failure of one entrusted with money to pay over when it is due
2. The power to hear and determine a case

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From the President's desk

Continued from page 3

comply the goals that leadership had laid out for the organization. As a result of that ongoing investment, REBA has the manpower to implement the many new initiatives required to meet those goals.

Exhibit F – As alluded to above, the addition of staff resources has made it possible to focus anew on the activities and goals of REBA Dispute Resolution, resulting in a marked increase in the mediation services being provided by REBA DR's distinguished panel of neutrals. In addition to providing those services in the context of ongoing court proceedings, initiatives are now being explored to expand REBA DR's business into less traditional areas as well.

Just as REBA aims to be the bar association of choice for the real estate practitioner, REBA DR is aiming to be the ADR provider of choice for all types of real estate disputes, whether in the context of a court proceeding, or in a transactional or permitting context. The continued growth of the business of REBA Dispute Resolution will, in turn, provide additional resources available to support all activities of the Association.

Exhibit G – I feel confident in stating that REBA has never been a more visi-

ble advocate on behalf of its members in the legislative arena than it is today. For that, thanks needs to go in part to our members who have stepped up in large and small ways to support the legislative efforts of their bar association.

But REBA itself has also committed significant additional resources to these legislative efforts, efforts which are now being bolstered not only by REBA's expanded staff but, more recently, by REBA's Special Legislative Counsel engaged to address unauthorized practice of law issues on behalf of the Association. Once again, REBA's leadership has identified this as an area to which additional resources must be committed in order to meet the critical needs of REBA's membership.

As a result, we are closer than ever to turning a dream into a reality – namely the passage of REBA's omnibus mortgage discharge reform bill. At the same time, we've worked tirelessly to impress upon our legislative leaders the importance to the public of keeping attorneys in charge of the residential closing process.

While we have always been well-served in the legislative arena by REBA's Legislative Counsel, Ed Smith, the Board of Directors of REBA, appreciating the importance of the legislative issues

which confront us today, has now made available to Ed and to REBA's Legislation Committee the additional resources necessary to keep REBA in the forefront of the debate on these critical issues.

Exhibit H – Not only has REBA become a more visible presence on Beacon Hill, but it is also increasingly recognized nationally as a leading voice in the public debate on national issues of importance to REBA members, including unauthorized practice of law issues and RESPA reform. I call your attention, in particular, to Joel Stein's article in this issue of *REBA News* reporting on the HUD roundtable on RESPA reform in Washington, D.C. to which REBA was invited. As always, REBA's Practice of Law by Non-Lawyers Committee also continues to monitor developments and engage in discussions with bar associations throughout the country on issues pertaining to the unauthorized practice of law.

I could go on with other examples, large and small, evidencing the recent transformation of REBA to a full-service bar association meeting the needs of the entire real estate bar. There is, as always, much that remains to be done, and we will continue to explore new ways to bring increased value to a REBA membership and to generate new resources

to allow REBA to better serve the needs of its members in the 21st century.

In the next issue of *REBA News*, you will be addressed in this column by Bob Moriarty as your new president. With your continued support, Bob will ably lead REBA to even greater accomplishments in the coming year. In the meantime, as we reflect back on the changes of the recent past and the progress that REBA has made to date, it is my sincere hope that you find yourself "getting to know" a bar association that, now more than ever, is serving your needs and representing your interests, and which warrants your continued support in the coming years.

I hope to see many of you at the Annual Meeting on Nov. 14 in Westborough, where I'll be able to thank you personally for the honor of serving as your President. For those who will not be able to attend that event, allow me to express my appreciation now.

For all the changes that we have seen in this wonderful bar association, one thing, thankfully, has not changed – REBA continues to count among its directors and many members the finest people I have had the pleasure of encountering in my professional life, and I will cherish always the opportunity that I have had to serve as your president.

REBA ad campaign stresses importance of real estate lawyers

REBA has resumed its statewide print advertising campaign this fall by placing advertisements in the Boston Herald and various community newspapers throughout the state stressing the important role real estate attorneys play in the home-buying process.

The ads target first-time home buyers because they tend to be the least knowledgeable about the advantages of having a real estate lawyer represent them when buying a home. The ads are meant to counter the misguided notions that an attorney should be hired just to review

the purchase and sale agreement, or that the buyer does not need an attorney because the lender has retained one.

The ads convey the message that hiring a real estate lawyer is an important first step to take in the home-buying process.

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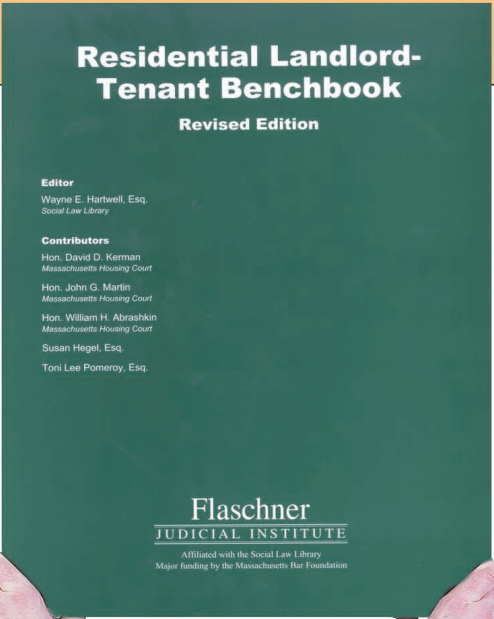
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'Check 21'

Continued from page 4

an unconditional order by the sender to its bank to pay funds which are actually and finally collected in the account of the sender to an identified account in a specific amount in the name of a beneficiary upon receipt of the order.

The rules regarding what day the depositor's bank has to make the funds available also require definition of the word, "day."

A 'Banking Day' is any day the bank is open, while a 'Business Day' is Monday through Friday, except the Monday holidays, Thanksgiving, July 4, Nov. 11, Dec. 25, and Jan. 1.

However, a bank can define its own Business Day to end at (for example) 2:00 p.m. for teller deposits and 12 noon for ATM deposits, notwithstanding the fact that the building is actually open and deposits are accepted.

And of course ATMs are always open.

The attached chart shows the limits a bank can place on checks its customer deposits before the bank must make the funds available.

The caveat to these rules is that if a check is drawn on insufficient funds a bank can pull its depositor's funds back upon notice of dishonor in the account of the payor (sometimes also known as "drawer" or "maker"). So, even if the bank lets its customer have use of the money, the original check still must clear payor's bank for the deposit to be final.

Real estate closing scenario

Applying these rules to a traditional real estate closing could mean the following scenario.

A sale occurs at 3 p.m. and the documents are recorded at 3:55 p.m. Funds (in the form of a lender's counsel's escrow account check) are given to the seller, based upon receipt by lender's coun-

sel of 'good funds' as defined by the Massachusetts 'Good Funds' statute (G.L. c.183, §63B). As a review of the accompanying chart (Figure A) shows, if a bank elects to make 2 p.m. the end of its "business day" and yet remains open until 5 p.m. on a Friday, a deposit of funds from a real estate closing made at 4 p.m. would be subject to a possible hold on the funds being available for withdrawal until Tuesday of the next week.

However, it is extremely common for the lender's counsel to have delivered a seller's proceeds check, in escrow, at the end of the closing, pending successful recording and to have transmitted the existing mortgage payoff checks by overnight courier for Monday delivery.

Before the advent of Check 21, the physical moving about of all those checks from closing attorney depositor's account, through the Federal Reserve and back to the payor's account would have delayed their processing until about the time the deposited funds were available for withdrawal. 'Check 21' however changes all that.

Impact of 'Check 21'

Under the new law, a bank which has received checks for deposit into its customer's account may use a process known as 'truncation,' then electronically communicate with the bank on which the check is drawn in another Federal Reserve district and present the

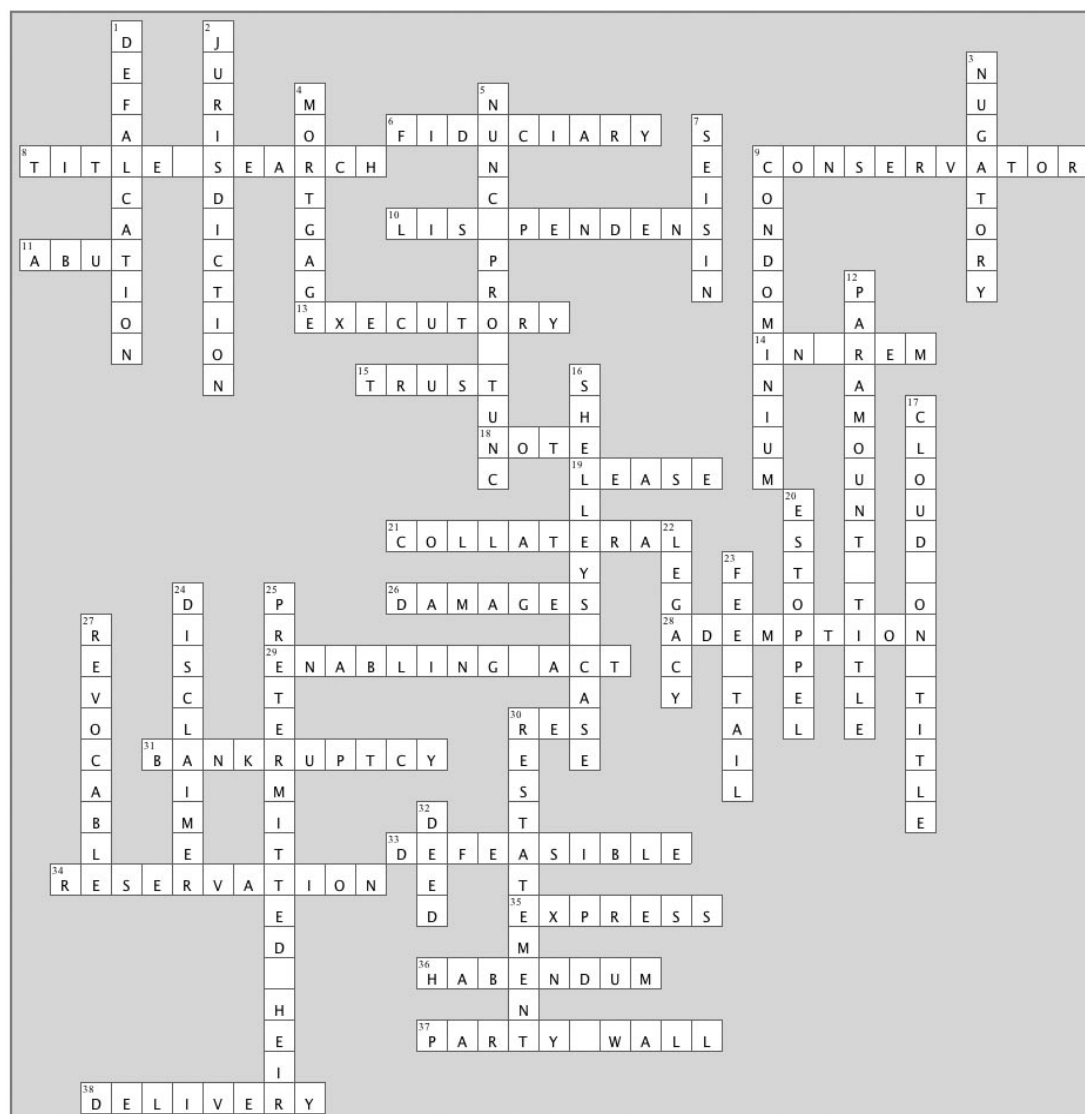
check for payment.

This electronic presentment eliminates the need for physical travel of the check to the Reserve district in which the payor's bank is located, thus reducing the time between deposit onto the payee's account and withdrawal from the payor's account from days to overnight or even hours.

Since the check is paid between the two banks electronically, there is no need for the physical check to travel to the other bank, and the truncating bank destroys the original paper check, replacing it in the banking system with a substitute check. This substitute check is

Continued on page 20

Solution for puzzle on page 16.



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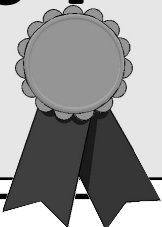
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‘Check 21’

Continued from page 19

what is ultimately delivered to the payee account holder with the other paper checks in a monthly statement.

While no banks are required to *create* substitute checks, they must all *accept* them. And neither the maker of the check or the payee may instruct that the check not be subject to truncation as part of its negotiation from depository bank to payee bank.

The banking industry is expected to slowly adopt the new procedures, as change can be expensive and time consuming.

One reason for possible slow adoption is the liability placed on the “truncating bank” to any recipient of a check for losses incurred because a substitute check was created and presentment of the original check would have triggered inspection. This includes losses caused by cre-

ation of a substitute check, and consequent loss of security features.

Examples of non-survivable security features include use of thermo-chromatic ink, true watermarks, chemically sensitive paper, visible fibers or the word “VOID” appearing if copied. Given this liability, many commentators feel that the first uses will be with smaller dollar amount consumer checks that need to be collected from many Reserve districts, such as national retail store credit accounts.

This could mean that large check amounts, such as mortgage payoff and seller proceeds checks, may not be subject to truncating and paper checks will remain.

Impact on closing attorneys

As mentioned at the beginning of this article, ‘Check 21’ and the speed by which it allows a check to be paid from the maker’s account will have an impact on law firms

conducting real estate settlements. As the accompanying chart shows, even when “good funds” are presented at a closing, the closing attorney’s depository institution could hold the checks and not credit the closing attorney’s account until the next business day after the banking day of deposit for the wire transfer and the cashier’s check, and up to five business days after the banking day of deposit for the IOLTA check.

A cautious conveyancer, depositing funds late on a Friday of a holiday week-end could find that the funds were not available for withdrawal until the middle of the next week. Yet with Check 21 the payoff check sent by overnight delivery *could* clear that same closing attorney’s account as early as Tuesday morning.

All escrow account holders, but most particularly real estate conveyancing attorneys, should discuss procedures with

their depository banks. Ask the bankers how they would treat the transaction set forth above and what impact it would have on the IOLTA account.

If there is any chance of an overdraft, bear in mind that an overdraft of a Massachusetts attorney’s IOLTA account will be reported to the Board of Bar Overseers. In addition, all conveyancers should ask about, and follow, any and all special bank procedures for depositing checks with the least hold time. Some banks have a requirement of ‘special’ deposit slips or a requirement to make the deposits in person.

Finally, in order to have a check which is less likely to be subject to truncation, it might be prudent to switch to check stock containing non-survivable safety features. If the bank is reluctant to truncate the check, it will slow down the presentment process.

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