REBA NEWS

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*The Newsletter of the*

*Real Estate Bar Association for Massachusetts*

# New Deed Indexing Standards issued

**By Richard Howe Jr.**

The Massachusetts Registers and Assistant Registers of Deeds Association has issued a new version of the Deed Indexing Standards for Massachusetts, which is available at your local registry, or online at www.lowelldeeds.com, the Middlesex North Registry of Deeds website.

For those of you who have mastered the prior version of the standards, don't despair; the old rules remain largely intact. The 2006 version incorporates much of the old while adding many new sections, making it more of a recording handbook than a simple set of indexing standards.

Some of the more noteworthy changes are highlighted below.

Perhaps the most significant addition is a new section called Recording Procedures. The new Deed Indexing Standards explain registry policies on matters such as recording certified copies or recording foreign language documents.

Another standard prohibits the re-recording of a document, a practice that has been routinely allowed in the past. While this will undoubtedly create some hardships, other mechanisms such as confirmatory documents will have to be used in the future.

Two of the new standards deal with "multiple documents," long a cause of ambiguity and confrontation at registries. Since these may prove to be the most controversial of the new standards, some explanation is in order.

Standard 7-8 (Multifunctional Documents) states that a document that accomplishes more than one function shall be treated as a multiple document and that a separate recording fee will be charged and index entry made for each of the document's separate functions. An example of this might be a single piece of paper with the

*Continued on page 20*

*Richard Howe is Register of Deeds of the Middlesex North Registry of Deeds.*

# TAVMA ally opens Boston office

The Association of New England Title Agents, Inc. (ANETA) – an ally of the Title/Appraisal Vendor Management Association (TAVMA) – recently opened an office in Boston.

TAVMA is the leading advocate for the bill pending on Beacon Hill (House Bill 904) that would allow non-lawyers to conduct commercial and residential real estate closings.

According to a recent article in a national trade publication, *The Legal Description,* the major goal of ANETA will be to provide a forum to improve the professional conditions of title agents doing business in New England. ANETA's website, www.aneta.com, is "under construction."

Berube

A Plymouth lawyer, Donald A. Berube, has been hired as the group's executive director. Berube formerly practiced in Braintree with Bulger, Berube and Donavan. He subsequently left the practice of law to run a non-profit foundation before being hired to rebuild the UMass-Dartmouth's alumni association. He is a graduate of UMass-Dartmouth and New Eng-

*Continued on page 15*

# CATIC donates $25K to fight TAVMA bill

CATIC, formerly known as Connecticut Attorneys Title Insurance Company, has made a $25,000 donation to the Real Estate Bar Association to help REBA's efforts to defeat House Bill 904.

This pending legislation, sponsored by the Title/Appraisal Vendor Management Association, known as TAVMA, would permit non-lawyers to conduct commercial and residential real estate closings in Massachusetts.

The TAVMA legislation would overturn existing Massachusetts case law defining the settlement of real estate transactions as the practice of law. According to records on file with the Secretary of the Commonwealth, TAVMA has expended over $165,000 over the past two years on lobbying fees alone.

"Supporting the role of lawyers is at the very core of our mission," said Richard J. Patterson, CEO of CATIC. "We serve lawyers in every

*Continued on page 20*


**CATIC, New England's only bar-related title insurance underwriter, recently donated $25,000 to REBA in support of the Association's efforts to defeat House Bill 904, legislation that would permit non-lawyers to perform commercial and residential real estate settlements in Massachusetts. Pictured (from left): CATIC President and CEO Richard J. Patterson; Michelle T. Simons, co-chair of REBA's 2006 Residential Conveyancing Committee; CATIC Vice President for Operations Anne G. Csuka; REBA 2005 President Daniel J. Ossoff; REBA 2006 President-Elect Sami S. Baghdady; and REBA 2006 Treasurer Thomas Bussone II.**

## What's in this issue…

# Ruling erodes rights of commercial landlords

## *'Immaterial' breach not enough to justify lease termination*

**By Herbert S. Lerman**

A recent decision of the Massachusetts Appeals Court further erodes the rights of commercial landlords.

In *DiBella v Fiumara*, 63 Mass. App. Ct. 640 (2005), the tenant had purchased the well-known Golden Banana Club in Peabody which features nude female dancing. He paid over $3 million for the business and took a 10-year lease with options from the landlord.

The rent during the initial term was $84,000 per year. The lease contained a fairly standard clause that the tenant should not make structural alterations or additions without the express consent of the landlord, which consent was not to be unreasonably withheld.

The lease also contained a default clause stating that if the tenant failed to cure a default (other than non-payment) within 30 days of written notice, the landlord could end the lease and take possession of the premises.

Attached to the back of the building was a storage shed that was in disrepair. The shed contained 240 square feet. The tenant demolished the shed and constructed a new 840 square foot shed (3 1/2 times larger) for $132,000. The new shed was also of sturdier construction.

Neither the demolition nor new construction was undertaken with the written consent of the landlord. Shortly after discovering what was happening, the landlord sent notice demanding that construction cease and that the tenant replace the old shed. The tenant responded by requesting the landlord's consent.

The landlord refused citing two major concerns: The addition would result in increased property taxes, and would also cause zoning issues since the nude dance club was a non-conforming use. Eventually the landlord commenced a summary process action.

### No Termination Allowed

The District Court judge ruled the breach was not material and the landlord could not terminate the lease. On appeal, the Appeals Court upheld the trial court ruling.

The Appeals Court distinguished differing breaches of a lease. If a breach is "material," that is, it is an "essential and inducing feature" of the contract, the landlord may terminate the lease even in the absence of a default clause. Whether a breach is material is generally a question of fact.

If a breach is "insignificant", that is, where there is a violation of a lease provision due to carelessness or oversight such as an accidental failure to insure, the court will use its equity power to prevent termination.

Finally, where a breach is not material but also not insignificant, the court will generally defer to the default provision of the lease.

The Appeals Court, however, in a footnote cited 2 *Friedman on Leases* 16:2.3 (5th ed. 2004) for the proposition that "[t]he inclusion in a lease of a clause purporting to permit a landlord to terminate in case of some breach is no assurance that the clause will be enforced."

Some landlords, no doubt, will attempt to insert a clause in their leases to the effect that any and all breaches by the tenant shall be deemed "material" or "significant," but it is doubtful whether such a provision would be conclusive.

The Appeals Court remarked that "[e]ven if a default clause would otherwise be effective, our courts do not look with favor upon penalties and forfeitures."

The court, citing Section 13.1 of the Restatement (Second) of Property

*Continued on page 15*

*A long-time member of the Association, Herb Lerman has practiced real estate law for over 40 years. He serves on the REBA Leasing Committee and the REBA Residential Conveyancing Committee.*



REBA
THE REAL ESTATE BAR ASSOCIATION *for Massachusetts*

**MEMBERSHIP APPLICATION**

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THE REAL ESTATE BAR ASSOCIATION
*for Massachusetts*

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**Mission Statement**

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

**Mentoring Statement**

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

**Endorsement Statement**

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

www.reba.net
Please note that the website address has changed and all active members have been notified of login information. Contact REBA for more information at cohen@reba.net.

# From the President's desk

**By Robert Moriarty**

The new year is a time to stop and take stock; a time to pause for a moment or two and reflect back on what has transpired in the past year, and think about the opportunities ahead, and how best to grasp those opportunities. A new year is also a time to ponder the challenges ahead and plan how best to overcome them.

As we look back, we do so with the satisfaction that the past several years have been successful ones for the Real Estate Bar Association. Beginning with the strategic plan envisioned by Kathleen O'Donnell and Greg Peterson and implemented by the leaders who followed them – Dick Keshian, Chris Kehoe and most recently, my predecessor, Dan Ossoff – REBA has emerged as an inclusive bar association representing the interests of real estate practitioners of every bent.

In addition to substantial membership growth over the last three years, we have added committees to respond to the concerns and interests of a wide range of practitioners. Our affordable housing, leasing, commercial real estate finance and litigation committees have become integral parts of REBA, strong participants in educational programs at our twice-yearly meetings

This past year we have added two committees further expanding the practice areas that REBA embraces. We are privileged to have Mary Ryan and Greg McGregor serving as co-chairs of our new Environmental Law Committee. Certainly there are not two more experienced, knowledgeable and influential professionals in the area of environmental law than Mary and Greg.

We have already benefited by the excellent programs that they put together for the Annual Meeting in November on recent changes in state wetland regulations and enforcement and an open meeting with the co-chairs of the Legislature's Joint Committee on the Environment, Natural Resources and Agriculture. We welcome the contributions that Mary and Greg will make over the coming years to REBA, not only in educating our members but also as a voice on environmental policy issues.

REBA also launched the Housing Court Bar Committee in the past year to add to our growing list of committees and practice areas. It is a measure of the prestige of the Association that retiring Chief Justice Manuel Kyriakakis reached out to REBA to be a home for the Housing Court bar.

Our Executive Director, Peter Wittenborg, has spent countless hours over the past year coordinating formation of the steering committee with Judge Kyriakakis and with other members of the Housing Court bar. REBA sponsored the recent dedication of a portrait of retired Chief Judge E. George Daher at the Housing Court.

This event was attended by Chief Justice Margaret Marshall and incoming Chief Justice of the Housing Court, Steven D. Pierce, various judges of the Housing Court and many others. These functions enhance the prestige of REBA and the visibility of our members.

REBA has also had some success at the State House in the past year. Our mortgage discharge bill – "The Dream" – that Chris Kehoe has worked so hard on for the last several years has gained momentum. We have collaborated with the bankers and other lender trade groups to forge a bill that is acceptable to all. It recently passed the Senate, thanks in great part to the support of Sen. Andrea Nucifero, and seems likely to pass in the House. We are optimistic that our Spring Seminar in May will focus on a newly-enacted mortgage discharge bill.

In the past year REBA has quietly worked behind the scenes on a number of issues of concern to our members. Through the auspices of our Legislative Counsel, Ed Smith, we worked with affordable housing groups, REFA, NAIOP, GBREB and others to defeat a proposal that would expand the excise stamp tax and have a negative impact on commercial investment and on affordable housing in the Commonwealth.

Members of our Legislative Committee continue to work with the Boston Bar Association's Real Estate Section and Sen. Robert Creedon to address widespread concerns about the homestead law in Massachusetts.

All is not perfect as we look ahead to in the coming year and beyond. REBA has been in the forefront of the fight against the unauthorized practice of law through Jon Davis and the Association's Committee on the Practice of Law by Non-Lawyers. This is an area that I will address in greater detail in future columns.

On a related front, we continue to face the very real threat of the House bill 904, which would permit corporations to engage in activities that have by tradition, and by statute, been reserved to lawyers. H. 904 would allow corporations to draft deeds, mortgages, leases and other documents as part of a sale or lease transaction. It would also allow them to represent commercial and residential lenders as closing agents, and to issue certifications of title and title insurance policies.

REBA continues to oppose this legislation as one of the most anti-consumer bills we have seen in recent times. Our clients deserve the professionalism that a lawyer brings to every transaction, whether it is the purchase of a first home, the sale of that home as it becomes time to make other arrangements upon retirement, or the financing of a multi-million dollar mixed-use project.

We bring a level of training and experience, and a level of responsibility that simply cannot be approached by a corporation, often based outside of the Commonwealth, which only has as its motive the profit of the single transaction.

REBA has been exceptionally fortunate to have Tom Bussone and Michelle

*Continued on page 11*

*A founding partner of Marsh, Moriarty, Ontell & Golder, P.C., Bob became president of REBA on Jan. 1. He was a long-serving member of the Association's Title Standards Committee from 1984 through 2003, serving as chair from 1998 through 2003. He concentrates in commercial and residential title matters including the review of title abstracts, title reports, title insurance commitments, title certifications and the resolution of title issues on behalf of title insurance underwriters, law firm clients, developer clients and institutional lenders. He is a graduate of Boston College and the University of Connecticut School of Law.*

# REBA Board welcomes five new members


Fiscus


DePalma


Regnante


Robbins


Travis

From Lenox to Provincetown, from Wakefield to Fall River, five seasoned real estate practitioners have joined the Real Estate Bar Association's Board of Directors for 2006.

**Wendy Fiscus** is a partner with the Boston firm of Rudolph Friedmann LLP. Admitted to the Massachusetts bar in 1992, she is an active member of NEWIRE (New England Women in Real Estate).

Wendy's practice concentrates on commercial and residential real estate with an emphasis on real estate development. She will co-chair the Association's Registries Committee with longtime Board member Greg N. Eaton of Andover.

**Karen DePalma** practices law in Provincetown. Admitted to the bar in 1980, she is also a member of the Barnstable County Bar Association and serves as a Land Court Title Examiner. Originally from upstate New York, Karen is a graduate of Hartwick College and the Franklin Pierce Law Center in Concord, N.H.

**Ted Regnante** is a founder and member of Regnante, Sterio & Osborne in Wakefield. He was admitted to the bar in 1961 after graduating magna cum laude in 1958 and from Boston College School of Law in 1961. He also served as a captain in the JAGC, U.S. Army in 1961-1962.

Ted's practice includes commercial lending, commercial real estate, music law, gaming law and entertainment law, as well as affordable housing, corporate, and estate planning and estate administration.

**Lori Robbins** practices real estate law, litigation and estates and trusts in Lenox with the firm of Phillip Heller & Associates. Admitted to the bar in 1986, Lori has a B.A. from the University of Michigan and a J.D. from Antioch School of Law. She is also an alternate member of the Zoning Board of Appeals for the Town of West Stockbridge.

A Plainville resident, **Luke Travis** is a principal in the Fall River firm of Reed, Boyd and Travis, P.C. A graduate of the United States Merchant Marine Academy and the New England School of Law, he was admitted to practice in 1989. He concentrates in residential real estate conveyancing, land use, zoning, municipal law, estate planning and estate administration.

*Tribute*

# Denis Maguire: Stellar attorney, champion of the less fortunate

**By E. Christopher Kehoe**

After a long, interesting and fulfilling life, Denis Maguire passed away peacefully after a brief illness on Nov. 14, 2005 at 87. Maguire was surrounded by family at the time of his death in a hospital in northern Maine.

As I sat in St. Denis' Church in North Whitefield, Maine, with my law partners and the friends and family of Denny Maguire, I reflected on his life and his influence on so many people. I listened to Denny's son, Jim Maguire, and my law partner, Alex MacDonald, as they eulogized a kind, gentle and compassionate man who had accomplished so much in his lifetime.

After attending Brockton High School and Thayer Academy, he attended Harvard College on a scholarship and graduated with honors. In World War II, Maguire was a Navigator in the Air Transport Command and guided bombers and transports around the world. Denis attended Harvard Law School on the G.I. Bill and graduated in 1948.

He then practiced law for 43 years at Harrison & Maguire, which later became Robinson & Cole.

Denis' accomplishments border on the legendary. He was the president of the Massachusetts Conveyance's Association (now REBA), and the recipient of REBA's highest award: The Richard B. Johnson Award.

His recent lengthy obituary in the Boston Globe describes a few of his accomplishments better than I could:

"He was the Treasurer of the Boston Bar Association and a member of the American College of Real Estate Lawyers. His heart, however, belonged to the cause of equal access to justice for the poor. He devoted countless hours to Greater Boston Legal Services.

"In the course of 32 years, he was a member of the Board, Vice President and then its President. He gave many additional hours to the Volunteer Lawyer's Project. So great was his devotion to equal justice that his peers conferred on him The Memorial Services Award in 1985 and, in 1991 both The Pro Bono Award and The Service to the Profession Award.

"His legacy endures. The Boston Bar Association

*Continued on page 16*

**Denis Maguire**

*Chris Kehoe is a past president of the Association and is a partner at Robinson & Cole. He currently co-chairs REBA's Legislation Committee.*

# Continued controversy: State homestead exemptions and the Bankruptcy Code

**By J. Patrick Walsh**

Perhaps no other area of bankruptcy and state insolvency laws has generated more discussion and controversy than homestead and personal property exemptions.

Criticism of the current patchwork of state exemption levels intensified with the passage of the Bankruptcy Code in 1978 and has continued since.

*Pat Walsh is regional counsel for Chicago Title Insurance Company and a longtime member of the Association. He currently serves on the Legislation Committee, and frequently testifies at public hearings on Beacon Hill on behalf of REBA.*

The changes brought about by the recent enactment of the federal Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) means this criticism can be expected to continue at even higher levels.

### History of Exemptions

The relationship between state exemptions and federal bankruptcy provisions has existed for over 100 years. Homestead exemptions began in the Republic of Texas in 1839 as a way to encourage settlers to locate there, and developed in almost all states through the 1860s.

In general, they were divided into homestead exemptions applicable to real property and personal exemptions, but any consistency among the states ended there. On one hand, there is an unlimited homestead exemption in Florida in the state constitution, but no homestead in Pennsylvania or Rhode Island.

There is a $7,500 exemption in North Carolina for a burial plot as an alternative to a homestead, and Oklahoma's exemption is "ten hogs that are primarily held for personal, family or household use."

The federal Bankruptcy Act of 1898 incorporated these state exemptions, and this system remained in place until 1978, when the Bankruptcy Code was adopted and created major changes. Not surprisingly, these changes occurred as a result of legislative compromises. The House had sought to establish a uniform mandatory system of federal exemptions, while the Senate sought to retain state exemption laws.

The compromise established a set of federal exemptions and allowed a debtor to choose between them and those of the state where he or she resided – unless that state "opted out" of the federal exemption provisions.

### Opt Out

In many cases, the new federal exemptions were much more generous than those which had originally been enacted over 100 years earlier. By the early 1980s, 37 states had opted out of the federal exemptions.

Massachusetts and other states with more generous homestead exemptions than the federal provisions did not opt out, since debtors would always choose the more generous state exemptions in any case.

For many years, the opt-out provisions have been criticized because the wide variety of state exemption laws encourages abusive "exemption planning" and forum shopping.

The bankruptcy courts have been

*Continued on page 17*

# Amended Bankruptcy Code attempts to empower real estate creditors and landlords

**By Melvin S. Hoffman**

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) made major changes to the Bankruptcy Code, reflecting Congressional desire to reduce the number of bankruptcy filings by making it more difficult for both consumer and business debtors to achieve debt relief in bankruptcy.

The amendments to the Bankruptcy Code under BAPCPA in the area of real estate reflect an attempt to improve the position of creditors and landlords. BAPCPA attempts to elevate the status of banks, trade creditors and landlords in certain significant respects.

Regrettably, BAPCPA is a poster child for breathtakingly poor statutory draftsmanship. As a result, disputes over the meaning and application of key provisions are inevitable.

It is likely that debtors and their creative counsel will attempt to circumscribe what landlords and creditors have achieved by litigating wherever possible.

Against this backdrop, I will highlight those BAPCPA amendments of particular interest to real estate practitioners.

A few provisions, such as changes to the homestead exemptions, took effect immediately when the law was passed in April 2005, but the bulk of the amendments took effect for cases filed on or after Oct. 17, 2005.

*A frequent speaker at Real Estate Bar Association education programs, Mel Hoffman chairs the bankruptcy practice group at Looney & Grossman LLP. He writes and lectures extensively on bankruptcy and insolvency issues. Hoffman is a contributing author to the MCLE best-selling publication, Real Estate Title Practice in Massachusetts.*

### Automatic Stay

The automatic stay provisions of Bankruptcy Code §362 are familiar to real estate practitioners, primarily in the context of foreclosures, evictions, attachments and the like. Section 362 imposes a broadly inclusive stay or injunction upon all of these activities automatically upon the commencement of a bankruptcy case.

Code §362 contains subsections dealing with: (a) activities which are automatically stayed [§362(a)]; (b) activities not subject to the stay [§362(b)]; (c) the duration of the stay [§362(c)]; and (d) grounds for obtaining relief from the stay [§362(d)]. BAPCPA includes amendments in many of these areas that are favorable to creditors.

A new Section 362(b)(20) excludes from the automatic stay any act to enforce a lien or security interest in real property for a period of two years after the date of entry of an order in a prior bankruptcy case granting relief from stay based on a finding that the prior bankruptcy petition was part of a scheme to delay, hinder and defraud creditors involving either: (1) a transfer of all or part ownership of or other interest in such real property without the consent of the secured creditor or court approval or (2) multiple bankruptcy filings affecting such real property.

The bankruptcy court order must be recorded in the appropriate registry. This section does not appear to be limited only to the creditor who obtained relief in the prior case but to any creditor seeking to enforce a lien or security interest in real property. Section 362(b)(20) dovetails with a new §362(d)(4) – which directs the bankruptcy court to grant relief from stay to a creditor whose claim is secured by an interest in real property based on either of the two criteria enumerated above.

Section 362(b)(21) excludes from the stay any act to enforce a lien or security interest in real property owned by a debtor who is not eligible to be a debtor under Code §109(g) or whose case is filed in violation of a court order prohibiting such filing.

Section 109(g) disqualifies an individual from bankruptcy eligibility for 180

*Continued on page 18*

# Child support lien statute and its quirks

By Ward P. Graham


REBA Title Standard No. 55, Massachusetts Tax Liens (Recorded), addresses the issue of when property is free of the lien reflected in a recorded notice of tax lien under G.L.c. 62C, §50 (the general Massachusetts tax lien statute) or under G.L.c. 151A, §16 (the employment security tax lien statute).

Essentially, absent a release or partial release of the lien, the title standard reflects the limitations periods set forth in the statutes.

While not specifically addressed in Title Standard 55, there is one other type of state tax lien notices of which conveyancers and title companies are seeing recorded more and more often: the lien under the Child Support Enforcement statute, G.L.c. 119A, §6. This statute has some quirks that bear discussion in the context of the lien periods and after-acquired property issues discussed in Title Standard 55 relative to other state tax liens.

Child support liens are not your typical state tax liens and must be reviewed carefully when issues of "perfection," lien priority and expiration arise.

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*Ward Graham is New England division counsel of Stewart Title Guaranty Company in Boston. He is a longtime member of REBA, and a member of the Legislation and Title Standards Committees.*

## Child Support Liens Generally

Under G.L.c. 119A, §6(a), the Child Support Enforcement Division of the Department of Revenue is empowered to collect overdue child support. Among the many collection procedures referred to in §6(a) are the "use of lien, levy and seizure" and "attachment of or lien against property."

Pursuant to this authority, §6(b) discusses the specific procedures for filing notices of child support liens at the registries of deeds as well as the effect of such filings on the creation, duration and relative priorities of these liens. Understanding the concept of "perfection" introduced in subparagraph (b)(3) is critical in recognizing a major difference between the operation of the general state tax lien provisions of G.L.c. 62C, §50, and the child support lien provisions of G.L.c. 119A, §6.

## When a Child Support Lien Arises

Under subparagraph (b)(1) of G.L.c. 119A, §6, the key point is that a child support lien arises when the support payment is due, not when the lien is "assessed" by a taxing or enforcing authority as in the case of tax liens under G.L.c. 62C, §50. Also, the child support lien is ongoing and applies to arrearages that can continue to accrue beyond whatever amount originally triggered the lien or the amount that may appear in a recorded notice of the lien.

## Property Interests Affected

Under subparagraph (b)(1), just about any real property interest a title examiner or conveyancer is likely to encounter in a real estate transaction could be subject to this type of lien. It states: "Upon recordation or registration in accordance with subparagraph (3), such lien shall encumber all tangible and intangible property, whether real or personal, and any interest in property, whether legal or equitable, belonging to the obligor. *An interest in property acquired by the obligor after the child support lien arises shall be subject to such lien,* subject to the limitations provided in subparagraphs (3) and (5)." [Emphasis added.]

In addition to the all-encompassing property interests subject to the lien, note in particular that the application of the lien to after-acquired property interests is explicit under §6(b)(1). Thus, it is imperative that title examiners run back titles for purchasers of real property to check for filed notices of child support liens as much as for other types of state and federal tax liens that affect after-acquired property (although, as to the latter, the attachment of those liens to after-acquired property has been established more by case law than the express provisions of the statute.

## Recording a Child Support Lien Notice

In regard to the filing of notices of a child support lien, subparagraph (b)(3) of §6 states that the Division "shall file notice of a lien with respect to real property in the registry of deeds or registry district for any county or registry district in the commonwealth where the obligor owns property, or in any other registry of deeds or registry district in the county where the obligor resides and may file such notice in any other registry of deeds or registry district in the commonwealth."

In terms of being able to identify the true obligor, subparagraph (b)(3) also provides that "[t]he social security number of the obligor shall be noted on the notice of the lien." Thus, if you have any question about whether a notice of child support lien found of record applies to a party to your transaction (whether seller or buyer), this information can be of great help in verifying or excluding application to your party. In today's environment of privacy and identity theft concerns, it is questionable as to how much longer the Division will continue to include such information in the recorded notices.

## 'Perfection' and Subordination of a Child Support Lien

The next few sentences of subparagraph (b)(3) discuss the concept of "perfection" of the child support lien, which puts an important twist on the lien priority and lien duration issues associated with this type of lien.

The portions of subparagraph (b)(3) important to these issues provide: "The filing shall operate to *perfect* a lien when duly recorded and indexed . . . as to any interest in real property owned by the obligor that is located in the county or registry district where the lien is recorded or registered. . . . If the obligor *subsequently acquires* an interest in real property, the lien shall be *perfected upon the recording* or registering of the instrument by which such interest is obtained . . . where the notice of the lien was filed within six years prior thereto.

"A child support lien shall *be perfected* as to real property *when both the notice thereof and a deed or other instrument* in the name of the obligor *are on file* . . . without respect to whether the lien or the deed or other instrument was recorded or registered first. . . . The *perfected lien shall not be subordinate to any recorded lien except a lien that has been perfected before the date on which the child support lien was perfected*; provided, however, that the [Division] may, upon request of the obligor, subordinate the child support lien to a subsequently perfected mortgage." [Emphasis added.]

The important twist here is that the lien is not "perfected" unless and until the

*Continued on page 13*

# New laws impact REBA members and their clients

**By Edward J. Smith**

The end of 2005 saw near frantic activity in the Legislature on a number of controversial measures, including bills dealing with taxation, health insurance, welfare, job creation and supplemental state appropriations.

Most did not get resolved before the holidays. Legislation that purported to close certain business tax "loopholes" (and which was prominent in the media for a failed attempt to enact higher retroactive tax rates for certain capital gains) was passed as **Chapter 163 of the Acts of 2005.**

Another failed piece in the bill was an attempt to expand application of the deeds stamps law to complex finance transactions that involve transfers of a controlling interest in any entity holding real estate. REBA worked with NAIOP, GBREB and other affected organizations to defeat the proposal.

Chapter 163 of the 2005 Acts did make changes that affect REBA members and their clients. A non-resident will have taxable income under Massachusetts law for ownership of an interest in a partnership, to the extent that the partnership holds an interest in real property located in the commonwealth. *See* **c. 163, §6** and G.L.c. 62, §5A.

Upon notification that a person is personally and individually liable under specified provisions of the law for the tax of a corporation, partnership *or limited liability company*, and the tax still remains unpaid after 30 days, the tax shall be considered to be assessed against that person, and a lien shall arise under G.L.c. 62C, §50 upon all property and rights of property, whether real or personal, belonging to said person in favor of the commonwealth. *See* **c. 163, §13** and G.L.c. 62C, §31A.

Such lien shall also extend to property or rights to property of a trust with respect to tax amounts due from a grantor or other person treated as the owner of a portion of such trust by reason of sections 671-78 of the Code, and to property or rights to property of a disregarded entity with regard to tax amounts due from the owner of the entity. However, as a result of a REBA-recommended amendment, with respect to real property and fixtures, the lien shall not be valid against a mortgagee, pledge, purchaser or judgment creditor unless the recorded notice includes the names of the persons in whom the record title to the real property or fixtures stands at the time thereof. *See* **c. 163, §18** and G.L.c.62C, §50.

The duration of a lien for child support is extended from six years to 10 years, subject to recordation for additional 10-year term(s). *See* **c. 163, §41** and G.L.c. 119A, §6. Chapter 163 was approved with an emergency preamble Dec. 8, 2005.

**Chapter 123 of the 2005 Acts** requires the installation of approved carbon monoxide detectors in residential property that contains fossil-fuel burning equipment or that incorporates enclosed parking within the structure.

Effective March 31, every such building or structure shall be so equipped and maintained annually by the building landlord or superintendent. Stricter requirements for new construction may be required by the State Building Code.

Certificates from municipal fire departments will be required upon sale or transfer of any building or structure occupied in whole or in part for residential purposes. If issued at the same time as a smoke detector certificate, the single fee will be charged for both certificates.

Buildings owned or occupied by the Commonwealth or any local housing authority, or for which hard-wiring is required, will not have to comply until Jan.1, 2007.

*Ed Smith is legislative counsel for REBA.*

# SJC upholds Land Court authority to Revoke 'erroneous' certificate of title

**By Michael P. Healy**

The Supreme Judicial Court recently ruled that the Land Court can invalidate a certificate of title for registered land issued in error by an assistant recorder.

The court in *Doyle v. Commonwealth* said the Land Court has the power to correct "errors and omissions" and to protect "the integrity of Land Court records."

*Michael Healy is a principal of Healy & Johnson in Holliston. He submitted an amicus brief in* Doyle v. Commonwealth *on behalf of REBA and The Abstract Club. Healy served as president of the Association in 1993.*

## Factual Background

On June 26, 1913, the Land Court issued a decree for Land Court Registration Case No. 3200, the name of "Salisbury Beach Association" (Original Registration).

On that same day, the Land Court issued to Salisbury Beach Associates the original Certificate of Title 1247 (Original Certificate). Land Court Plan 2300-A, dated Jan.11, 1911 was identified on the Original Certificate and described the initial parcels of the Salisbury Beach area.

Land Court Plan 3200-XV was approved on April 27, 1920 and further subdivided the Salisbury Beach area, (1920 Plan). The 1920 Plan contained instructions from the Land Court recorder to the local registry, on the lower left hand corner, stating that "separate certificate of title may be issued for Lot 362B and the lots numbered in Blocks C, H, O, P, & Q, as shown hereon."

The land involved in the case (the Locus) is not shown as an independent lot on the 1920 Plan. The Locus is an area bounded by Lot 1 and Lot 23 on the northerly boundary and Lots 10 and 11 on the southerly boundary. There are no easterly or westerly boundaries for the locus shown on the 1920 Plan.

JoDee C. Doyle, as trustee of the Four Ninety Four NEB Realty Trust (Trust), obtained title to the Locus by deed dated June 8, 1992, for $25,000 from the Salisbury Beach Associates. The easterly boundary was described as "by land now or formerly of the Salisbury Beach Associates, fifty (50.00) feet." The westerly boundary was described as "Westerly by the Easterly line of the State Highway fifty feet."

The deed also contained a representation that "all of the boundaries are determined by the Court to be located as shown upon Plan No. 3200 XV…. the above land is shown thereon as 8th Street East".

The Essex South District Registry Assistant Recorder issued the Trust a Certificate of Title No. 62268, dated June 22, 1992 ("Trust's Certificate").

## On Second Thought

The Trust filed a supplemental petition under Land Court Registration Case 3200, Nov. 26, 1996, to eliminate the term "8th Street East" from Land Court Plan 3200. In a letter dated Dec. 3, 1006, the chief title examiner of the Land Court indicated to the Trust's attorney that "Certificate of Title, 62268 should not have been issued. A Stop Order has been entered at the local registry and not (sic) further documents will be accepted on this certificate of title."

On July 9, 1997, the Trust filed an Amended Petition to approve plan, and then July 14, 1998 filed a second amended petition to approve plan. The Commonwealth of Massachusetts, the

*Continued on page 14*

# From the President's Desk

*Continued from page 3*

Simons, leaders of our Residential Conveyancing Committee, working tirelessly to reach out to REBA members and to other bar associations across the state about the impact of this legislation. Tom and Michelle have literally traveled from the north shore to the Berkshires to Cape Cod on this grassroots effort, sometimes all in one day.

I also want to thank all of the title insurance underwriters who have joined us in the battle to defeat H. 904. They have sponsored seminars and have been instrumental in getting information on H. 904.

I also want to express our appreciation for the work that Jack Brennan and Lynda Bernard of the Brennan Group, our special legislative counsel on H. 904, have been doing to get our message to legislators.

This is not an issue that will go away easily or quickly. Our opponents are well-funded and intent upon incursion into Massachusetts. They have described Massachusetts as "a battleground" state. We must be as resolute as our opponents.

REBA has budgeted funds for our special legislative counsel and strategic communications consultants for this year and anticipate that more will be needed in the coming year. It is an expensive process, but one that we must take on with all the resources that are required. Many of you have already given to the REBA Political Action Committee. We are grateful for those contributions that have allowed us, in turn, to make contributions to the political campaigns of key members of the Legislature, and for your officers to attend numerous fundraisers and other functions to help keep the interests of REBA in the forefront.

If you have given in the past, we need your help again. If you have not yet given, now is the time to recognize the importance of lawyers in real estate transactions by donating money to the REBA PAC.

On a personal note, I am genuinely excited about the opportunity to lead REBA in the coming year. The challenges will be great, but my job has been made easier by the efforts of those who have come before me, particularly my immediate predecessor, Dan Ossoff who has done such an extraordinary job in leading the organization in the past year. I can rely upon the officers and directors who devote so much time and effort to making REBA a better, stronger organization, as well as the staff at REBA – Peter, Susan, Nicole and Bob – who give so much.

I am also comforted to know that I have the support of the 3,000 members of REBA who know that this is the bar association of choice for real estate practitioners who care about providing the best, most professional and competent services to their clients.

# REBA Obtains Logo Trademark Registration

The U.S. Patent and Trademark Office recently approved the Real Estate Bar Association's distinctive REBA logo (service mark) and registered the logo as a service mark under the U.S. Trademark Act of 1946, as amended.

The Association is grateful for the work of attorney G. Arthur Hyland Jr. of Hyannis in registering the REBA service mark.

**www.reba.net**

# Land Court initiatives benefit practitioners

**By Karyn F. Scheier**

As 2005 comes to an end, the Land Court completes two years at our 226 Causeway Street location in Boston.

During that time, we have seen the surrounding area transformed by the removal of both the North Station overhead "T" and the Central Artery. It has taken two years for people to find us on a regular basis, and for the post office to forward our mail from the Brooke Courthouse, but the adjustment is complete, and we are reaping the benefit of the neighborhood's ongoing enhancement.

This year has also marked significant changes within the court. During 2005, we completed our first year of operation under Standing Order No. 1-04, through which the court implemented our individual calendar system and time standards. Both systems were adopted after many meetings with and input from the bar.

As of February 2006, we will pass another milestone when we complete the first year of operation under MassCourts, the Trial Court's web-based data management system.

The Land Court is the only department of the Trial Court in which MassCourts has been implemented fully, but the roll out in the other departments is underway.

Finally, since July 1, 2005, the Land Court has been operating under a new set of rules, which supersedes all prior Land Court rules. During the past year we expanded our use of telephone conferencing for lawyers and litigants who are located at great distance from the Boston. This works well for short status conferences and discovery motions. In addition, all of our judges have tried cases throughout the Commonwealth to accommodate lawyers, witnesses and litigants.

We have received good responses to all of our initiatives, which have required cooperation and diligence on the part of our staff and lawyers who practice in the court. The court believes that the combination of our individual calendar system and the early scheduling of substantive case management conferences has led to more cases settling at earlier stages in the litigation. For now that belief is anecdotal, but MassCourts allows us to compile data regarding when cases are settled and time to disposition, so we will have more solid information from which to draw conclusions in the future.

During the first full year of our time standards, 735 individually assigned miscellaneous cases were filed, of which 228 have been disposed, either by agreement or by court disposition. Ninety-five cases were referred to alternative dispute resolution. The court continues to screen all cases for ADR at an early stage, to determine which cases might be appropriate for mediation, case evaluation, or arbitration.

One more significant initiative marks the beginning of 2006. On Jan. 2, the "2006 Manual of Instructions" became effective for surveyors preparing surveys and plans to be filed with the court.

On the same day, the court's Engineering Department will be renamed the "Survey Division" to more accurately reflect the nature of its work. The 2006 Manual of Instructions was developed through the long, hard work of a committee co-chaired by Judge Leon Lombardi and Antonio D. Cavaco, PLS, working with court personnel, surveyors and lawyers.

The Instructions of 2006, Standing Order No. 1-04, and the Land Court Rules are all available on the court's website and the REBA website.

As always, we welcome and appreciate comments from the bar and the public. We plan to solicit feedback on the individual calendar system, time standards, and the Land Court Rules in a more formal way during 2006.

*Karyn F. Scheier is chief justice of the Massachusetts Land Court.*

# Child support lien statute and its quirks

*Continued from page 8*
support obligor has *or acquires* an interest in real property within the county or registry district where the notice of lien is filed or recorded. Thus, the statutory time period for the life of a child support lien under §6(b)(5) (discussed below) does not begin to run at the time the notice of lien is recorded, but rather from the time the lien is "perfected" against property interests owned or later acquired by the obligor.

The other important twist under §6(b)(3) is the provision that, unless otherwise subordinated by the Division, the child support lien "shall not be subordinate to any recorded lien except a lien that has been perfected before the date on which the child support lien was perfected."

Notice that, unlike the general tax lien provisions of G.L.c. 62C, §50, there is no automatic protection afforded here to even good-faith purchase-money mortgagees of property acquired by the support obligor after the "perfection" of the child support lien. The statute does, however, give the Division discretion to subordinate to a subsequently perfected mortgage upon request of the obligor. Unfortunately, it doesn't say anything about subordination if requested by someone other than the obligor, such as the mortgagee itself, or what the criteria are for granting or refusing the subordination.

### Duration of a Child Support Lien

Under G.L.c. 119A, §6(b)(5), the child support lien expires when the child support obligation ends, it is paid in full, or the Division releases the lien. I have not yet seen anyone attempt to show termination of the lien by presenting some form of evidence that the obligation has terminated, and that any arrearages have been fully paid. Absent statutory guidance, the question would be the quantum of proof necessary to conclusively establish termination in that manner. Most likely, a release from the Division would be required in the event the lien has not expired due to lapse of time.

In regard to expiration by lapse of time, the current version of subparagraph (5) provides that the lien expires "six years from the date on which such lien was first perfected." This portion of the statute also provides for extending the lien period for additional six-year periods by filing further notices. (There is legislation pending to extend these periods to 10 years, however.)

This is another example of "perfection" being the triggering point for several aspects of the child support lien. Unlike the general state tax lien or a federal tax lien (where the commencement date of the lien period is the date of assessment) or an employment security lien (where the lien period begins the January first next after the end of the year in which the wages were paid), the six-year lien period for child support liens does not begin until the lien is "perfected."

If the support obligor does not own property in the county at the time the notice of lien is filed, then, in effect, the lien hibernates for six years waiting to be awakened and to pounce on some after-acquired real property interest of the obligor once the deed or other instrument creating the interest is recorded or filed in the same registry.

Theoretically, even without the filing of an extension as authorized by the proviso in subparagraph (5), a child support lien could last for up to 11 years, 11 months and 30 days. With an extension filed within the last year of such period, you can tack another six years on top of that . . . and so on and so on.

Thus, keep the concepts of "perfection," "after-acquired property interests" and "no automatic subordination" uppermost in mind whenever dealing with child support liens.

# SJC upholds Land Court authority to Revoke 'erroneous' certificate of title

*Continued from page 10*

Town of Salisbury, and various abutters filed timely answers and objected to the petitions.

The Trust filed a motion for summary judgment on March 1, 2002, and a second motion for summary judgment on August 12, 2002. The Commonwealth of Massachusetts, the Town of Salisbury, the Girls Realty Trust and 5D Trust, timely filed cross motions for summary judgment.

The Land Court denied the Trust's motion for summary judgment and allowed the cross-motions for summary judgment of the Commonwealth of Massachusetts, the Town of Salisbury, the Girls Realty Trust and 5D Trust. The Trust appealed the Land Court decision to the Appeals Court. The Supreme Judicial Court exercised direct appellate review.

### Cleaning up the Record

The main purpose of land registration is to protect the title of grantees who act in good faith in accordance with the statutory framework of M.G.L. c.185. Specifically, M.G.L. c.185 §46 states: "Every subsequent purchaser of registered land issued a certificate of title for value and in good faith shall hold the same free from all encumbrances except for those noted on the certificate."

The statute (M.G.L. c.185 §54) also states original and transfer certificates of title are conclusive as to all matters contained therein, except as otherwise provided in statute.

In this case, the SJC considered whether the statutory protections shielded the Trust's Certificate from review by the Land Court where the certificate was erroneously issued by an assistant recorder.

The Trust argued that once the Certificate was issued, the Land Court judge had no authority to rule on its validity. The SJC disagreed, noting that case law has established two exceptions to the rule that holders of a certificate of title take free from all encumbrances except those noted on the certificate.

For example, the court had previously ruled: "If an easement is not expressly described on a certificate of title, an owner, in limited situations, might take his property subject to an easement at the time of purchase: (1) if there were facts described on his certificate of title which would prompt a reasonable purchaser to investigate further other certificates of title, documents, or plans in the registration system; or (2) if the purchaser has actual knowledge of a prior unregistered interest." (*Jackson v. Knott,* 418 Mass. 704, 711 (1994)).

The court in *Doyle* said M.G.L. c.185 §114 gave the Land Court authority to correct errors or omissions on a certificate after proper notice and a hearing. Further, the court concluded that Chapter 185 provides the Land Court power to cancel certificates issued in error in certain circumstances.

The court found that the Trust's Certificate issued to the Trust was inconsistent with the Land Court's instructions on the 1920 plan, and the Trust could not rely on the assistant recorder's error to shield the Trust's Certificate from later scrutiny from the Land Court.

Further, the Trust accepted a deed containing a representation that the Locus boundaries had been approved by the Land Court, which was inaccurate.

"In this context, the Trust had at least constructive notice of the error and, therefore, does not enjoy the status of the Purchaser holding a certificate in good faith," the court wrote in *Doyle*.

For nearly 150 years, the Land Court has had a well-settled rule that any mistake arising from the misprision of a clerk may be amended and set right.

The SJC went on to add that "it is not a purpose of the system to afford those who deal with Registered Land in bad faith any greater protection than they who have in similar dealings with Unregistered Land."

# REBA supports Katrina disaster relief

Dan Ossoff, REBA's president, has announced that in lieu of holiday gifts to Board members, the Association has made a $1,000 contribution to the Louisiana Bar Foundation's Disaster Relief Fund.

This fund was set up after the devastation of the Gulf Coast area to help lawyers and other members of the legal community to re-establish their lives.

"It seemed appropriate to reach out to our bother and sister lawyers in need instead of a holiday gift to Board members," Ossoff said.





***Send a letter to the editor!***

Peter Wittenborg, Executive Director, REBA, 50 Congress St., Suite 600, Boston, MA 20109-4075 or wittenborg@reba.net.

# Ruling erodes rights of commercial landlords

*Continued from page 2*

(Landlord & Tenant) (comment j), also pointed out that even when a lease contains a default clause, "equitable considerations ... if present, may entitle the tenant to relief against the forfeiture of his lease for a mere failure to perform his promise."

### Breach Not Material

The Appeals Court, in refusing to allow termination by the landlord, deferred to the District Court's finding that the breach in this case was not material. Moreover, the tenant had offered to pay any increase in the real estate tax resulting from the new addition.

The Appeals Court also noted no other place in the town existed where the tenant could take the business since it was the sole location where an adult strip club was permitted.

The court said there was also nothing to prevent the landlord from seeking damages or restoration of the original shed. The adverse effect of a lease termination on the tenant here was greatly disproportionate to the minimal effect of the breach imposed on the landlord.

Practitioners should remember that summary process cases are typically commenced in District Court, which, since the advent of the one-trial system, have been given full general equity powers similar to the Superior Court, including the power to grant injunctive relief. See St. 1996, c. 358, §3 and Uniform Summary Process Rule 9.

This case illustrates most vividly the ancient maxim that equity still abhors forfeitures, and landlords may well be unsuccessful in evicting tenants where a breach of lease is not material, particularly in cases where damages or other injunctive relief will make the landlord whole.

The holding of this case will no doubt be cited frequently by tenants in future summary process proceedings in an attempt to stave off a landlord's desire to terminate their leaseholds.

# TAVMA ally opens Boston office

*Continued from page 1*

land School of Law.

Berube, who lives in Seekonk, also serves as an adjunct professor at the Southern New England School of Law in North Dartmouth.

The officers of ANETA are James K. O'Donnell, Nicholas Simeone and Michael Massey.

O'Donnell is CEO of Equity Title and Closing Services, Inc., a major supporter of TAVMA based in East Providence, R.I. Equity Title has branch offices in Woburn, Braintree, Worcester and Taunton.

Massey is a principal of Market Street Settlement Group, Inc., a New Hampshire corporation that is a subsidiary of Cendant Settlement Services Group, a regular TAVMA member.

Simeone is a principal of Sutton Land of Connecticut, LLC, a Connecticut-based real estate settlement services provider.

ANETA's articles of organization identify the group's corporate purpose as follows:

"The corporation is organized to improve business conditions for real estate title agents in New England; to provide education, training and a forum for the exchange of ideas, best practices and challenges facing local and regional real estate title agents; to serve as a voice for its members in the legislative processes of New England states; and to inform, educate and promote to the general public issues relative to its members."

# Denis Maguire: Stellar attorney, champion of the less fortunate

*Continued from page 5*

renamed its Public Service Award, The Denis Maguire Public Service Award. And the Volunteer Lawyer's Project renamed its Annual Pro Bono Award, The Denis Maguire Pro Bono Award. Community service of other kinds called him. He was a Solicitor, then Captain and later Chairman of the Brookline Red Feather Campaign, a United Way Predecessor."

He lived during most of his professional life in Westford. When he moved there, there were no zoning bylaws.

As detailed in his obituary, "he worked for the next 30 years to enact and then administer them. He was a founding member and later Chairman of the Planning Board. He was a member and unofficial counsel to the Westford Town Committee. Denis served Charles River Academy, a small private school for learning disabled children as Treasurer for many years. He and his first wife Gene (who died in 1969) organized benefit auctions for the school featuring himself as Auctioneer. He enjoyed the roll of Benefit Auctioneer so much he reprised it for the ACLU, the Kidney Foundation and the Fenn School."

As his family wrote in his obituary, "Denis was a child of the Great Depression. Faithful to his roots, he was a fervent New Deal Democrat. As the tide has risen for Conservatives in recent decades, Denis' liberal ideals burned brighter. If words were brickbats, no window in the Republican White House would have gone unbroken. Denis did more than just talk. He was for example, a tireless organizer in the successful election of Father Robert Drinan into Congress.

"Denny eventually retired in 1991 to a 1794 farmhouse that he completely restored himself. The house was heated solely by a wood stoked Russian furnace in the basement, and for many years, Denny cut every piece of wood that heated his farmhouse. He and his wife, Ann Marie, later built a home on Swan's Lake, off Bass Harbor, Maine, where he would sit in the kitchen and read poetry to Ann Marie."

As Ann Marie mentioned in his obituary, "as his years accrued he did less physical work, but exercised faithfully. He propelled himself through daily walks of 2 or 3 miles. Sometimes he fell and found it hard to get up. It has been said that he was picked up by most of the women on Swan's Island."

Denis had seven children, and according to Ann Marie, "he loved his family. He believed in god and the gospels."

Denis had another family and that was his family at Harrison & Maguire. He was a mentor, teacher and father figure to the lawyers who worked there with him. I was proud to have been Denis' partner at Harrison & Maguire.

When we merged with Robinson & Cole in 1993, every partner at Harrison & Maguire became a partner at Robinson & Cole and to this day, every former Harrison & Maguire partner is still a partner at Robinson & Cole, a fact which is almost unheard of in the annals of law firm mergers. I attribute this to Denis' influence on all of us, and frankly his ability to hire people who shared his philosophy and would work well together. We at Robinson & Cole still share his philosophy and still work well together.

As I sat in the Chapel, reflecting on Denny's life, it occurred to me that the wonderful eulogies presented by Jim and Alex did not concentrate on his legal accomplishments, but instead emphasized his compassion and willingness to help people less fortunate to gain access to justice through legal services. In his lifelong commitment to helping young lawyers and guiding them with his words and actions, I think Denis would be very pleased with the direction that REBA has taken, especially with the Mentoring Program developed by President-Elect Sami Baghdady.

I hope each of you reading this article will take a moment to reflect on Denis' life and on your own as well. Think about how you could make a difference in the life of someone less fortunate than you. Consider also whether you have had a positive effect on the life of a young lawyer, whether through words or deeds, to educate the legal professionals of tomorrow.

In 2004, I was privileged to serve as the president of the Real Estate Bar Association for Massachusetts. I was proud to follow in Denis' footsteps and the footsteps of two other attorneys from Harrison & Maguire, who have also served in that capacity: Fosdick Potter (Pete) Harrison and Ruth A. Dillingham.

At the end of 2005, when I completed my term as chair of REBA's Nominating Committee, the committee voted to create The Denis Maguire Community Service Award, which will be presented for the first time at REBA's meeting in May 2006. I hope to see you there.

My law partner, Alex MacDonald, closed his remarks on the life of Denis Maguire by paraphrasing the author, Ted Sorenson: "We are fortunate to have lived in the time of Denis Maguire." Indeed.



# Continued controversy: State homestead exemptions and the Bankruptcy Code

*Continued from page 6*

called upon to decide which of these actions is legitimate and which constitute fraud, and this has introduced a level of arbitrariness into the system which is seen as undermining its purpose and integrity. As a result, many commentators have recommended a uniform set of federal exemptions to replace the smorgasbord of state exemptions.

The National Bankruptcy Review Commission was appointed by Congress and its recommendations served as the starting point for the BAPCPA. In its 1997 report, *Bankruptcy: the Next Twenty Years*, the Commission recommended that the opt-out provisions be eliminated:

"The Commission recommends the elimination of the provision in section 522 that permits states to opt out of bankruptcy exemptions. State exemption law would be fully applicable to individuals who deal with their creditors under state law and for the creditors who pursue their rights through state law. Yet, for debtors who seek the protection and unique attributes of federal law, such as the automatic stay and the discharge, the implicit bargain is different.

"To receive federal protection, a debtor should be willing to give up all property in excess of a federally determined amount. At the same time, each debtor who declares bankruptcy would be guaranteed protection of the same amount of property, and creditors would be entitled to the excess, regardless of where the debtor resides. Beginning with a premise of national uniformity, the exemption rules can be created in light of the particular policies and special features of bankruptcy law and collective bankruptcy proceedings."

However, the Commission made a partial exception when considering homesteads:

"The debtor should be able to exempt the debtor's aggregate interest as a fee owner, a joint tenant, or a tenant by the entirety, in real property or personal property that the debtor or the dependant of the debtor uses as a residence in the amount determined by the laws of the state in which the debtor resides, but not less than $20,000, and not more than $100,000. Subsection (m) of section 522 should be revised to reflect that all exemptions except for the homestead exemption shall apply separately to each debtor in a joint case." (Collier on Bankruptcy, Matthew Bender & Co., Inc., App. Pt. 44-140 (6/98).)

### Missed Opportunity

Unfortunately, the BAPCPA, as finally enacted, did not adopt these recommendations. Instead, the interaction of state homestead statutes and Bankruptcy Code provisions has become even more complex. The opt-out provisions remain, and Bankruptcy Court judges now have the additional obligations of applying fraudulent transfer guidelines and other evidence of debtor misconduct to decide if debtors' actions pre-filing are legitimate exemption planning or a fraud against creditors.

As one commentator has recently stated:

"Congress's failure to put an end to unlimited homestead exemptions, once and for all, however, is the least positive aspect of its treatment of exemptions. Instead, Congress chose to isolate particular types of conduct – such as moving to a state with generous exemptions shortly before bankruptcy filing, or participating in securities fraud – and to place homestead caps only on those debtors. Surely that strategy will only elevate the art of bankruptcy planning to a higher plane, to the continued benefit of debtors with substantial assets and access to skilled bankruptcy lawyers." (Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, 79 Am. Bankr. L. J. 397, 418 (2005).)

The Bankruptcy Court in Massachusetts has become the primary interpreters of our homestead statutes (G.L.c. 188, §1, et seq.). Like the exemption provisions in the Bankruptcy Code, the provisions of the Massachusetts statute have been criticized as inconsistent and unnecessarily complex.

**Unfortunately, the interaction of state homestead statutes and Bankruptcy Code provisions has become even more complex under the bankruptcy reform law passed in 2005.**

A major criticism is that homesteads in Massachusetts do not arise automatically. A filing with the Registry of Deeds is required under either G.L.c. 188, §1 or §1A. However, unlike many states, homesteads in Massachusetts are not merely fixed dollar exemptions, but instead are interests in real estate. As a result, the parties entitled to the benefits of a homestead declaration cannot be removed from possession, except in the limited circumstances set forth in §1 and §1A, respectively.

The provisions in the statute applicable to the priority of a homestead declaration and whether a homestead interest has been terminated are especially complicated and continue to generate their own line of Bankruptcy Court decisions (*Homesteads*, REBA 2005 Spring Seminar materials, at 155.)

Finally, a number of recent amendments to the statute have raised the current amount of homestead exemption to $500,000 placing Massachusetts near the most generous levels of any state. However, because homestead declarations also create the aforementioned interests in real estate, even this high number will be superfluous in many cases.

There have been several recent proposals to amend the current homestead statutes in Massachusetts to address its perceived deficiencies. After BAPCPA, the Bankruptcy Court will continue to be the primary forum where the homestead statutes, in whatever form, are litigated and interpreted.

From a conveyancing perspective, the primary goal of future amendments should be to simplify the existing Massachusetts homestead statutes so that it is possible to interpret them consistently and to determine with certainty who is, and who is not, entitled to their protection.

# Amended Bankruptcy Code attempts to empower real estate creditors and landlords

*Continued from page 7*

days after the dismissal of a bankruptcy case due to willful failure to abide by orders of the court or if the debtor requested and obtained the voluntary dismissal of the case following the filing of a motion for relief from stay by a creditor.

Prior to this amendment, if an ineligible debtor filed a new bankruptcy case prudent practice dictated the creditor's filing a second motion for relief from stay in the new case or a motion to dismiss the new case. This will no longer be necessary.

Sections 362(b)(22) and (23) deal with residential evictions. The first excludes from the automatic stay eviction proceedings where the landlord obtained judgment for possession prior to the commencement of the bankruptcy case. The second provision excludes from the automatic stay residential eviction actions that are predicated upon endangerment of the property or illegal use of controlled substances on the property, provided the landlord files and serves a certification with the bankruptcy court to that effect and the debtor does not object within fifteen days.

As to the duration of the automatic stay governed by Code §362(c), BAPCPA has added two new subsections. Section 362(c)(3) provides for the termination of the stay 30 days after the filing of a case when a prior case of the debtor was pending within the preceding one-year period but was dismissed. Section 362(c)(4) provides that the stay shall not go into effect at all if two or more cases of the debtor were pending within the previous year but were dismissed.

Having expanded the universe of creditor activities not subject to the automatic stay, BAPCPA has added procedures to §362 to enable a debtor to seek the imposition or continuation of the stay upon a showing of cause. [(Code §§362(l) and (m); 362(c)(3)(B); and 362(c)(4)(B)].

With regard to obtaining relief from the automatic stay, §362(d) has been amended in two significant ways. The first is with respect to §362(d)(4) discussed above. The other significant amendment to §362(d) relates to so-called "single asset real estate" as defined in §101(B) of the Code.

A creditor with a claim secured by single asset real estate must receive relief from stay, unless, within 90 days from the petition date or 30 days after the court determines the debtor to be a single asset real estate debtor, (1) the debtor has filed a confirmable plan of reorganization, or (2) the debtor has commenced making monthly debt service payments to the creditor in an amount at least equal to interest at the non-default contract rate on the value of the creditors interest in the real estate.

### Commercial Leases

Code §365 contains the rules governing the rejection or assumption and assignment of executory contracts and unexpired leases. Historically, these represented some of the most powerful tools available to debtors seeking to rehabilitate in Chapter 11. In keeping with the overall approach of BAPCPA, §365 has been amended in ways that, for the most part, benefit landlords at the expense of debtors.

Under the pre-amendment version of §365(d)(4), trustees or debtors were given 60 days from the date of commencement of a bankruptcy case to decide whether to assume or reject an unexpired non-residential real estate lease.

In practice, especially in cases involving multiple-leased locations, debtors obtained from the court lengthy extensions of the 60-day period, thereby keeping landlords in limbo as to the future of the leased space. BAPCPA has given landlords certainty.

Now, a trustee or debtor has 120 days from the commencement of the case to determine whether to assume or reject an unexpired non-residential real estate lease and may seek a single 90-day extension of the 120-day period. No further extensions are permitted unless the landlord consents.

Code §365(f)(1) is another powerful weapon in a debtor's arsenal. It permits the assignment of non-residential leases notwithstanding anti-assignment clauses typically found in such leases. Under pre-amendment case law, many bankruptcy courts applied this provision to shopping center leases, often overriding tenant mix provisions such as use clauses, radius restrictions and exclusivity provisions, finding them to be disguised anti-assignment clauses and thus unenforceable in connection with a proposed assumption and assignment.

Section 365 (f)(1) has now been amended so as to exclude tenant mix provisions found in shopping center leases from being classified as anti-assignment clauses.

In recognition of the reality that by imposing a maximum 210-day time period for the assumption or rejection of leases, some debtors will elect to assume a lease improvidently, BAPCPA has imposed a cap on a landlord's damage

*Continued on page 19*





## Send a letter to the editor!

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*Continued from page 18*

claim in a case where an assumed lease is subsequently rejected or terminated by a debtor.

Bankruptcy Code §503(b)(7) creates a new administrative expense priority for non-residential real property leases that have been assumed pursuant to §365 and then rejected or terminated. All monetary obligations due for the period of two years following the later of the rejection date or the actual turnover of the premises, less only amounts actually received from an entity other than the debtor, are accorded an administrative expense priority ahead of all pre-petition claims.

Prior to BAPCPA, the entirety of a landlord's damage claim resulting for the post-petition rejection of an assumed lease would be accorded an administrative expense priority.

When a trustee or debtor decides to assume a lease, Bankruptcy Code §365(b) requires the prompt curing of all defaults under the lease. Prior to the amendment, courts were in disagreement as to whether the obligation to cure included pre-existing non-monetary defaults which sometimes were impossible to cure.

Section 365(b)(1)(a) has been amended to make it clear that such defaults need not be cured. In the case of a "going dark" restriction, however, the amendment makes it clear that the debtor or trustee must cure such a default on a going-forward basis.

### Homestead Exemptions

The 2005 amendments to Bankruptcy Code §522 regarding homesteads promise to generate a whole new wave of litigation on top of the steady stream of decisions already emanating from the Bankruptcy Court in this highly confusing area of Massachusetts law.

Section 522(b)(3) – permitting a debtor to elect state rather than federal exemptions – now includes a test for determining which state's exemptions apply. A debtor is subject to the exemptions of the state in which he or she was domiciled for the 730 days immediately preceding the date of bankruptcy filing.

When a debtor has not been domiciled in a single state for 730 days, then the applicable state becomes the state in which the debtor was domiciled for the longest portion of the 180-day period *preceding* such 730-day period.

Notwithstanding the $500,000 Massachusetts homestead amount, new Code §522(p) now imposes a $125,000 cap on a debtor's homestead exemption under state law if the property was acquired by the debtor during the 1215-day period preceding the date of bankruptcy.

In order to meet this test, a debtor may piggyback on the ownership of a prior residence to the extent the proceeds of the prior residence were transferred into the current residence, but only if both residences are located in the same state.

This provision has already generated litigation, with bankruptcy courts divided as to whether §522(p) applies in all states or only in states where debtors have a choice of either state or federal exemptions, as opposed to so called "opt-out" states where debtors are required to choose only that state's exemptions. *See In re McNabb*, 326 B.R. 785 (Bankr. D. Az. 2005) ($125,000 cap applies in non-opt out states only); and *In re Kaplan,* 331 B.R. 483 (Bankr. S.D. Fla. 2005) ($125,000 cap applies in all states).

Section 522(o) permits the court to reduce a homestead exemption to the extent of any value attributable to the debtor's disposing of any non-exempt property during the ten-year period prior to the date of bankruptcy with the intent to hinder, delay or defraud a creditor.

Section 522(q) imposes a $125,000 cap on homesteads of debtors engaged in certain wrongful conduct.

**Regrettably, the amendments to the Bankruptcy Code are a poster child for breathtakingly poor statutory draftsmanship. Disputes over the meaning and application of key provisions are inevitable, and debtors will attempt to circumscribe what landlords and creditors have achieved by litigating wherever possible.**

REBA's Housing Court Bar Committee sponsored a dedication of the portrait of Hon. E. George Daher, retired Chief Justice of the Housing Court on Dec. 8, 2005. In the photo, Judge Daher's five grandsons unveil the portrait. Judge Daher's three granddaughters also participated in the dedication. The portrait will hang in the Housing Court in the Edward W. Brooke Courthouse.

# CATIC donates $25K To fight TAVMA bill

*Continued from page 1*

state where we do business, Patterson said. "We cannot just 'talk-the-talk.' We must also 'walk-the-walk.'"

In a thank you letter to Patterson and CATIC Chief Operating Officer Anne G. Csuka (posted on REBA's website, www.reba.net), REBA President Dan Ossoff said:

"This donation will support REBA's efforts to insure that attorneys will continue to offer service to consumers and businesses in real estate transactions that adhere to the highest of professional standards. Our adversaries, the sponsors of House Bill 904, are strong and well-funded with many corporate allies nationwide.

"As a small, non-profit professional association," the letter continued, "REBA must instead rely on annual dues from our lawyer-members and others. This donation will be a tremendous help to us. We are delighted that CATIC stands shoulder-to-shoulder with REBA in this effort."

In a letter to CATIC Massachusetts agents, Patterson explained that CATIC had cancelled the company's annual holiday gala for agents and staff to allocate additional funds to this donation.

"The supporters of House Bill 904 are substantial corporations willing to commit substantial sums," Patterson wrote in the letter. "The conveyancing bar, on the other hand, consists literally of several thousand small businesses. There is a substantial disparity in the economic power of the parties to this dispute."

Tomas Bussone II, co-chair of REBA's Residential Conveyancing Committee, said: "We are thrilled with this donation! If every title insurance underwriter gave a donation to REBA similar to CATIC, we would have a level playing field in our battle with TAVMA."

# New Deed Indexing Standards issued

*Continued from page 1*

caption "Assignment of Mortgage" in which a single lender assigns three different mortgages granted by three different homeowners on three different properties to a single assignee.

Although this assignment is just a single piece of paper that will receive a single instrument number, the registry will treat it as though it is three different assignments. Recording fees will be calculated accordingly.

Standard 7-9 (Multiple Documents – Attached as Exhibits) prohibits the bundling of documents that could be recorded on their own. For example, a death certificate may no longer be attached to a deed as an exhibit but must be recorded as a separate document. The one exception to this rule is an affidavit intended to clarify something about the chain of title filed in accordance with G.L.c.183, §5B. The Indexing Standards permit another document to be recorded as an attachment to this type of affidavit, which, for indexing and fee calculation purposes, would be treated as a single document.

The new Indexing Standards also announce document formatting rules that will not be enforced until Jan. 1, 2007. These specify minimum margin and font size, paper color and size and a variety of other things.

The one-year grace period is intended to allow those who use non-complying preprinted forms to reduce inventories and to design new documents that will comply with the standards.

Most of the standards are straightforward and easy to understand, so anyone who works with real estate should carefully read the new version.

### Continuing Dialogue

For the Indexing Standards to be truly useful, however, everyone involved – registry workers and registry users especially – must do more than just read them. We all must commence and continue a discussion about the standards and their day-to-day application.

Since the original standards went into effect six years ago, there have been few, if any, complaints about their contents. The complaints and problems have revolved around the application of and compliance with the standards by the registries.

Despite the best efforts of the registries, it is impossible for statewide standards to anticipate every conceivable variation of name and document composition. Hundreds of years of local practice cannot be obliterated by the publication of a list of standards.

Even with complete acceptance of the standards, it is inevitable that each registry will have some unique practices.

Consequently, each registry of deeds should develop and publicize its own "local supplement" to the statewide Indexing Standards. This would do much to limit the guesswork (and resulting anxiety) that local indexing variations require of registry users.

Such a document could specifically address the change over from one way of indexing a particular name to another. Will the new system be applied only on a going-forward basis or will the existing index be converted so that the name is indexed consistently throughout the database? The answer is critical to registry users.

In addition, the Registers of Deeds Association should also publish a supplement to the standards annually with a complete revision every five years.

And to facilitate a conversation among all registries and all registry users, a statewide Indexing Forum has been created on the Middlesex North Registry of Deeds website, www.lowelldeeds.com. When you download your copy of the new Indexing Standards, please visit the forum, register to participate, and post your comments and concerns.