REBA NEWS

Fall 2007
Vol. 4, No. 4

*The Newsletter of the*
*Real Estate Bar Association for Massachusetts*

**New insurance benefit for members, see page 15.**

# Borrower's interest statute: a potent weapon?

**By Douglas W. Salvesen**

The mortgage foreclosure crisis is rooted in an accumulated lack of accountability — by consumers, loan officers and lenders. While consumers certainly deserve a significant portion of the blame for taking on mortgages that were foreclosures waiting to happen, there are indications that many did not understand the risks they had assumed.

According to a recent poll by Bankrate.com, 34 percent of homeowners did not know what type of mortgage they had.

This is hardly surprising. The rapid proliferation of exotic mortgage products can baffle even sophisticated borrowers. It is precisely because granting a residential mortgage is a large and complex consumer financial transaction that federal and state governments have enacted numerous consumer protection laws and regulations in this area.

On the federal level, Congress passed the Home Ownership and Equity Protection Act in 1994 to preclude certain refinance loans unless the refinancing is "in the borrower's interest." However, HOEPA is limited to a relatively small number of so-called "high-cost" loans and has little application to most refinancings.

On the state level, Massachusetts is one of a handful of states that has enacted broader protections for consumers. Since 2004, G.L.c. 183, §28C, has prohibited a lender from knowingly refinancing a home loan that was closed within the prior five years unless the refinancing is "in the borrower's interest."

In the morning-after lawsuits that borrowers will file contesting the foreclosures of their mortgages, they will likely claim that their refinance loan is not valid because it was not "in the borrower's interest."

Moreover, a violation of the statute would also constitute an unlawful practice under Chapter 93A and permit a borrower to recover exemplary damages, attorneys' fees and costs. More importantly, the borrower may also seek to rescind the loan, which the lender should

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**SPECIAL IN-HOUSE PROGRAM**

# How to keep corporate counsel satisfied

The Real Estate Bar Association's Litigation Committee will host a special program for practitioners interacting with corporate counsel on Tuesday, Oct. 16, at 4 p.m., at The Union Club of Boston, 8 Park Street, Boston.

The program, "What Every Lawyer Must Know to Keep In-House Counsel Happy," will feature Devra G. Bailin, senior corporate counsel at Cumberland Farms, Inc.; William G. Constable, executive vice president of A.W. Perry, Inc.; David S. Friedman, first assistant attorney general; William J. Geary, vice president and general counsel of Clean Harbors, Inc.; Ward P. Graham, vice president and New England regional counsel of Stewart Title Guaranty Company; and Eugene Gurvits, vice president and regional counsel at First American Title Insurance Company. Thomas O. Moriarty and Lawrence P. Heffernan, co-chairs of the REBA Litigation Committee, will moderate the program. A cocktail reception for panelists and registrants will follow.

**DAVID S. FRIEDMAN**
**Program presenter**

"Lawyers do not always know what their clients are really thinking," says Moriarty. "Many clients, particularly in-house counsel, are too busy to give a level of feedback which allows the lawyer to measure the weaknesses and strengths of the attorney/client relationship. This is an opportunity to hear what our clients are really thinking … the good, the bad and the ugly."

Geary joined Clean Harbors in 1989 and he has served as vice

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# Annual Meeting to feature Coakley

Attorney General Martha Coakley is scheduled to be the keynote speaker at REBA's Annual Meeting and Conference luncheon on Tuesday, Nov. 13, at the DCU Center in Worcester.

Coakley has dedicated the last 20 years to a career in public service. She has a strong history as an advocate — not only for individuals and communities, but also for the best interests of the commonwealth at large. She brings a diverse and extensive legal background, a proven track record of bringing people to the table to find effective solutions to issues facing the commonwealth, and a strong commitment to her role as a public servant.

**COAKLEY**

Coakley began her legal career in 1979, practicing civil litigation at Parker, Coulter, Daley & White and later at Goodwin Procter, both in Boston. While in civil practice, Coakley gained extensive experience in such areas as insurance defense, criminal defense and large-scale construction litigation.

She joined the Middlesex District Attorney's Office in 1986 as an assistant district attorney in the Lowell District Court office. In 1987, Coakley was invited by the U.S. Justice Department to join its Boston Organized Crime Strike Force as a special attorney. She returned to the DA's Office in 1989, and in 1991 was appointed chief of the Child Abuse Prosecution Unit, during which time she investigated and prosecuted hundreds of cases of both physi-

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## What's in this issue…



A Supplement to Massachusetts Lawyers Weekly

# Attorney weighs in on REBA Title, underwriters

## Letter to the Editor

Dear ladies and gentlemen:

Just a note to thank you and all other contributors to REBA News. It is very well put together and the articles are most informative.

In reading the summer 2007 edition dealing with the idea of REBA Title ("From the President's desk"), it occurred to me that there is a phenomenon in the marketplace that the association should recognize and address.

When I first started practicing law, my mentor told me that whatever was good enough for the Land Court was good enough for us, and where the Land Court did not have a rule, Orrin Rosenberg, who was then the chief title examiner, would be happy to give his opinion on real estate-related issues. Rosenberg acted as a mediator in many instances where attorneys may have had an issue as to what was the wheat and what was the chaff.

Prior to the late 1970s, title insurance, as one old-timer once told me, was a less expensive alternative than registration or confirmation. Title insurance was only used in those instances where, in fact, there was a perceived title problem in which title insurance would be used to make the deal happen and provide "insurance" against the problem.

With the advent of the secondary market came the requirement for title insurance for all loans. The wisdom of Rosenberg was replaced by the title insurance underwriter.

The association and its members put in a tremendous amount of work to create the title standards, practice standards and forms for its members' use. In addition, the association has put in a tremendous amount of work in obtaining legislation for the benefit of making titles more marketable — the most recent achievement being the discharge statute.

However, with a conservative underwriter those efforts become somewhat irrelevant when the underwriter refuses to insure title if, in the underwriter's opinion, the title is not close to perfect, rather than the standard test for marketability of title, which is that the title not be subject to adverse claims which could be reasonably expected to expose the purchasers to controversy and expense to maintain their title.

One underwriter I know requires that in each instance a termination of a collateral assignment of leases and rents be recorded along with a discharge of the mortgage, notwithstanding Title Standard No. 65 and Land Court Guideline No. 39, which provides that if the discharge contains the words "acknowledges satisfaction of the same," the conditional assignment of leases and rents recorded with the mortgage will not be carried forward on the next certificate of title.

One of the most vexing problems in conveyancing has been the corporate authority issue in connection with out-of-state foreclosure documents. That issue was addressed as part of the mortgage discharge statute in [G.L.c.] 183, Section 54B.

In the REBA-sponsored conferences I attended it was clear from those panelists that the statute was intended to cover the foreclosure deed and the first deed following the foreclosure deed. Notwithstanding that statute and the position of REBA, one underwriter requires a secretary's certificate for authority for a foreclosure deed if it is not executed by a president or vice president and the treasurer or assistant treasurer.

While it is all well and good for the association to endeavor to adopt standards and enact legislation, those efforts become irrelevant if an underwriter sows the seeds of paranoia in the minds of conveyancers and panders to the pedantic.

However, at the end of the day, it is all about the money.

I would suggest that the association conduct a poll, at least annually, evaluating the underwriters in carrying out the mission and spirit of the association in engendering rational and reasonable standards in evaluating marketability of title issues. That evaluation, if used by the members in choosing an underwriter, would assist in advancing the goals of the association.

Clearly, any association of REBA Title with an underwriter should have, as its foremost requirement, the reputation of that underwriter in advancing the goals of the association.

Thomas V. Bennett
Barron & Stadfeld
Boston

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*for Massachusetts*

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

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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 Sami S. Baghdady**

As my year as president of this 150-year-old association comes to an end, I am so impressed by the dynamics of our real estate bar. I am fascinated by the colleagues I have had the fortune to work with and meet. No other bar association is so committed to its members, and conversely, no other bar association is so vigorously supported by its members. Thus, mutual commitment has drawn much attention to the Real Estate Bar Association, both at the local and national levels.

I remember only a few years ago when our goal was to register just over 300 attendees at our twice-yearly conferences. This year our Annual Meeting and Conference on Tuesday, Nov. 13, will draw nearly 800 participants and over 50 exhibitors and vendors. The program, highlighted by Attorney General Martha Coakley as the luncheon keynote speaker, will include eight 45-minute breakout sessions addressing the latest issues of real estate law for our members.

The camaraderie amongst our members resonates strongly at our Annual Conference.

In the last several years, the caseload of our dispute resolution subsidiary has more than doubled. With a number of immensely respected, recently-retired judges joining the panel of neutrals, REBA/DR is now the market leader for the settlement of business and real estate disputes.

We welcome retired judges Suzanne V. DelVecchio, Catherine A. White, George Jacobs and Mel L. Greenberg to the program. Later this year, retired Appeals Court Chief Judge Christopher J. Armstrong will join the panel.

While REBA/DR is an approved provider of court-connected dispute resolution services for the Superior Court, Housing Court and Land Court, the majority of our cases are direct referrals from our members and their colleagues, many of whom are repeat clients of the program.

Judicial notice of the legal opinions of our joint Abstract Club/REBA Amicus Committee continues to be impressive. This year has been especially active for the committee. We have filed five amicus briefs, including our first-ever brief with the 1st U.S. Circuit Court of Appeals. Henry H. Thayer, who has chaired the committee since its inception in the mid-1970s, has passed the torch on to his able vice-chair Edward M. Bloom. Thayer's long and outstanding leadership has earned the committee the respect it currently enjoys. Moreover, we are grateful that Thayer will remain a committee member. Elsewhere in this issue of REBA News is an interesting report by Thayer and Bloom on the founding and growth of this committee and its important work in shaping the law for over three decades.

A popular resource for real estate lawyers, the REBA Guide to the Massachusetts Registries of Deeds was first published in 1989 under the guiding hand of longtime member and former association President Joel A. Stein. After publishing three successive editions, Stein has turned this work over to the current co-chairs of our Registries Committee, Richard M. Golder and Wendy M. Fiscus. Golder and Fiscus have now published the new fourth edition of the guide, available on the REBA website, www.reba.net, and also in CD format. As a special bonus, the REBA Foundation will distribute free copies of the guide in CD format to members who register for our Annual Meeting and Conference.

Our battle to preserve the role of the lawyer in the commercial and residential real estate closing process has drawn national and local attention, particularly in light of the association's federal court case against National Real Estate Information Services, Inc. No other bar association is so proactive on this unauthorized practice of law issue.

In response to the efforts of profit-driven, nonlawyer real estate settlement companies to dominate the closing market in Massachusetts, approximately 150 of the state's most influential conveyancers have banded together to form the Conveyancers Leadership Council. Chaired by Marvin W. Kushner, members of the CLC are staunch supporters of the lawyer's role in the commercial and residential conveyancing process. To that end, they are willing to invest their financial resources and time, lobby their legislators and do whatever it takes to support the cause.

In addition, numerous county bar associations, including Hampden, Plymouth, Barnstable, Berkshire, Worcester and Norfolk, have organized local real estate bar advocacy groups and/or passed resolutions to support REBA's efforts to oppose the practice of law by non-lawyers. I am confident we can continue to succeed in this long-term battle with such universal support and commitment.

On a personal note, I am honored and immensely proud to have served as president of this remarkable association, and thank our board, committee members and the general membership for their dedication and support.

*Founder of Baghdady Law Offices, with locations in Arlington and Worcester, Sami S. Baghdady concentrates in commercial and residential real estate law, zoning and land use, leasing, as well as business and corporate law. He has served on the REBA Board of Directors since 1999, chairing the association's Membership and Public Relations Committee since 2000. He led the committee's 2004 launch of the REBA peer-to-peer mentoring program, a popular member benefit. He also established the association's successful state-wide lawyer advertising program, which promotes the role of the real estate lawyer in the conveyancing process. He can be e-mailed at sami@baghdadylaw.com.*

**Send a letter to the editor!**

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# IOLTA and escrow accounts 101

By James S. Bolan

It goes without saying that all lawyers reconcile their bank accounts, except for those who don't.

In the course of our practice advising and representing lawyers and law firms (from solo practitioners to 1,000-plus lawyer firms), issues regularly arise as to the handling and management of funds, including IOLTA and escrow funds — they are not always the same.Many lawyers, including real estate practitioners, have never reconciled their accounts and have been living off the "float" as their practices mature. Indeed, more Board of Bar Overseers issues arise in conveyancing work than in any other endeavor, generally because of the volume of work, handling wired funds, delays inherent in securing discharges and escrows or holdbacks, as a result of which checks can remain in the financial ether for years.

To complicate matters, many lawyers amalgamate escrow funds with client/trust funds rather than setting up separate escrow accounts.

An escrow account should be treated quite separately. It is defined as a bank account, generally held in the name of the depositor and an escrow agent, that is returnable to the depositor or paid to a third person on the fulfillment of an escrow condition.

Under Massachusetts law, escrow agreements need to be in writing (see, for example, *Kaarela v. Birkhead*, 33 Mass. App. Ct. 410 (1992); *Aranha v. Eagle Fund, Ltd.*, 245 B.R. 1 (Bankr. D. Mass. 2000); and *Mercurius Inv. Holding, Ltd v. Aranha, et. al.*, 247 F.3d 328 (2001)).

For numerous public policy and liability reasons, lawyers must maintain in sacrosanct form the financial records of client and third party (including escrow) funds that come into their possession. While lawyers can choose to ignore their personal checking accounts to a "fare thee well," handling someone else's money imposes an affirmative and actionable duty to adhere to mandated rules.

Indeed, if Massachusetts were to adopt a rule, such as the one in New Jersey permitting random audits of IOLTA accounts without prior notice to bar counsel of a dishonored check or a grievance having been filed (see, for example, the Random Audit Program that has operated since 1981 under New Jersey Court Rule 1:21-6 and Rule of Professional Conduct 1.15.), the ranks of practicing lawyers might be substantially thinner.

## Funds at issue

"Trust property" means property of clients or third persons that is in a lawyer's possession in connection with a representation that includes property held in any fiduciary capacity in connection with a representation, whether as trustee, agent, escrow agent, guardian, executor or otherwise. Trust property does not include documents or other property received by a lawyer as investigatory material or potential evidence.

## Information lawyers must maintain

Rule of Professional Conduct 1.15(f)(1)(A) requires lawyers to record: the name and address of the bank or other depository; the account number; the account title; the opening and closing dates of each account; and the type of account (whether it is an IOLTA account or a separate client fund account for the client).

For each account, there are three types of accounting records that must be kept by the lawyer. They are a ledger for each client matter, a ledger for bank fees and charges, and a check register.

## Ledger for each client matter

Rule 1.15(f)(1)(C) requires attorneys to keep individual client records (or ledgers) for each separate matter in which the lawyer holds funds for a client. Each ledger must identify the name of the client, detail all

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*James S. Bolan chairs the litigation practice group of Brecher, Wyner, Simons, Fox & Bolan in Newton. He is a frequent lecturer and author at programs and seminars on professional discipline, attorney malpractice and risk prevention matters. He can be e-mailed at jbolan@legalpro.com.*

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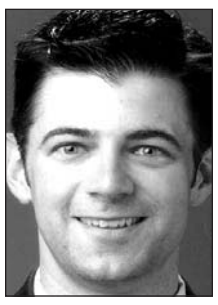
# REBA wins early discovery battles against NREIS

**By Benjamin M. McGovern**



Within Massachusetts: "No individual, other than a member in good standing, of the bar of this commonwealth shall practice law."

As part of its continuing effort to defend this important principle, the Real Estate Bar Association is pursuing a federal lawsuit against National Real Estate Information Services, a non-lawyer real estate closing services provider that, REBA alleges, engages in the unauthorized practice of law within this state.

Gael Mahony, Lawrence R. Kulig and Benjamin M. McGovern of Holland & Knight represent REBA in this matter, which is pending before U.S. District Court Judge Joseph L. Tauro.

In its complaint, filed in November 2006, REBA alleges that NREIS engages in the practice of law by performing "closing services" that constitute real estate conveyancing. Among other functions, NREIS reviews title to real estate to determine the status of ownership and any encumbrances thereon, prepares legal documents designed to convey ownership interests, conducts settlements and closings, records deeds and mortgages, and disburses funds at or after the closing.

Each and every one of these activities constitutes the practice of law in Massachusetts.

REBA's complaint further contends that, in order to give the appearance of complying with Massachusetts law, NREIS retains attorneys to witness the execution of documents at the closing. However, with no substantive task to perform and no direct relationship with the mortgage lender, the involvement of these attorneys does not change the underlying reality that NREIS performs the core function of a lawyer in these real estate conveyances.

This summer, REBA's lawsuit against NREIS proceeded to the early stages of discovery. Almost immediately, disputes arose. As part of the mandatory "initial disclosures" that are required in every federal lawsuit, REBA had requested that NREIS provide it with a list of every Massachusetts real estate transaction that NREIS had participated in for the past five years, later reducing that period to the past three years.

REBA informed Tauro that the production of such a list was a necessary first step in the discovery process, because it would give REBA a starting point from which it could select a representative sampling of transactions that would provide a full picture of NREIS' past and current business practices. NREIS objected to REBA's request for this list, arguing that since REBA is only seeking prospective injunctive relief in this lawsuit, any inquiry into NREIS' historical activities would be irrelevant.

Tauro heard oral arguments on the parties' respective positions during a hearing on July 19. The result was a victory for REBA. In an order issued on Aug. 7, Tauro agreed with REBA's position that NREIS should be required to produce a list of its Massachusetts residential real estate transactions for the past three years, as well as a list of any Massachusetts attorneys involved with those transactions.

Pursuant to Tauro's order, in late August, NREIS produced a list of all residential real estate transactions in Massachusetts for which it provided closing services between the dates of July 1, 2004 and July 31, 2007. The informa-

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*Benjamin M. McGovern, together with Gael Mahony and Lawrence R. Kulig, serves as special UPL counsel to REBA in connection with the NREIS litigation. McGovern is an associate in Holland & Knight's litigation practice group, with experience representing clients in federal and state courts at both the trial and appellate level. Prior to joining Holland & Knight, he served as a judicial clerk for Appeals Court Judge Joseph A. Grasso Jr. He is a graduate of Duke University and Boston College Law School. He can be e-mailed at benjamin.mcgovern@hklaw.com.*

Reach A Higher Bar

CATIC is pleased to announce the release of the 2007 Attorney Business Index (ABI) Report. This exclusive report is a comprehensive study analyzing trends in attorneys' real estate practices. It includes information on fee structures, profitability and sources of revenue. The results of the study are presented by state and law firm size, making the report even more relevant to you and your practice. Register at www.CaticAccess.com to order your complimentary copy of the report's executive summary.

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# 'Moot v. DEP': where we are today

By Deborah A. Eliason

On Feb. 12, the Supreme Judicial Court invalidated a regulatory exemption promulgated by the Department of Environmental Protection under G.L.c. 91, the waterways statute, relative to "landlocked tidelands." *Moot v. Department of Environmental Protection*, 448 Mass. 340 (2007).

This decision appears to have invalidated the exemption relied upon for the construction of many existing projects on landlocked tidelands and has created enormous uncertainty for new projects proposed to be constructed in landlocked tideland areas.

The case involved a challenge to a DEP decision holding that the construction of a multi-use project was exempt from the licensing requirements of Chapter 91 because it involved a landlocked tideland.

The roughly triangular project site consisted of a 48-acre abandoned rail yard and industrial land located in East Cambridge, bounded by the Monsignor O'Brien Highway, the Gilmore Bridge and the Massachusetts Bay Transportation Authority rail lines and maintenance facility. The site contained approximately 13 acres of filled commonwealth tidelands originally filled under a Chapter 91 license issued in 1962 to the Boston and Maine Railroad. Under the original license, drainage culverts were constructed beneath the site and the Millers River, which is no longer visible on the site, currently flows through these culverts.

Under the public trust doctrine, the commonwealth holds tidelands in trust for the use of the public for fishing, fowling and navigation. Through Chapter 91, the Legislature expressly mandated that any nonwater-dependent use of the tidelands serve a proper public purpose. The obligation to ensure that the public interest and public trust are protected lies with the DEP.

In 1983, Chapter 91 was amended to allow the DEP to license nonwater-dependent uses, only if, after a public hearing, it made a written determination that the structure or fill served a proper public purpose and that said purpose provided a greater public benefit than detriment to the rights of the public in such lands.

In 1990, the DEP promulgated regulations indicating that the areas subject to licensing and permitting by the DEP did not include "landlocked tidelands," which are currently defined as "any filled tidelands which on January 1, 1984 were entirely separated by a public way or interconnected public ways from any flowed tidelands, except for that portion of such filled tidelands which are presently located: (a) within 250 feet of the high water mark, or (b) within any Designated Port Areas. Said public way or ways shall also be defined as landlocked tidelands, except for any portion thereof which is presently within 250 feet of the high water mark." 310 CMR § 9.02.

In the *Moot* case, the DEP issued a negative determination of applicability on the basis that the site was located on landlocked tidelands which are exempt from licensing and permitting by the DEP under its regulations.

This decision was appealed and the SJC ultimately held that the regulation relied upon by the DEP was invalid because it was in excess of its legislative authority to exempt all landlocked tidelands from Chapter 91 licensing requirements.

This ruling could have a far reaching impact on existing, proposed and future properties located on landlocked tidelands. The ruling calls into question past developments sited on landlocked tidelands under the now invalid DEP regulation and raises concerns as to what ad-

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*Deborah A. Eliason is of counsel at the national land use and environmental law firm of Beveridge & Diamond, where she concentrates in the area of real estate law. Previously, she practiced real estate law for 16 years with Kopelman & Paige. She can be e-mailed at deliason@bdlaw.com.*

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# Legislative update: committees address 40B, tidelands

By Edward J. Smith

The first session of the 2007-08 Massachusetts General Court will soon be history.

The year was remarkable with the arrival of a new governor and a new Senate president. News stories about the symbols of politics often crowded out real substantive discussions on big issues.Events outside, as well as inside, the state have demonstrated that housing, health care and education continue their dominance as public policy issues. And matters of public health and safety, energy and the environment, transportation and other public infrastructure have been making headlines.

Our clients in business and government understand that they have a role to play in the investments they make in their companies, institutions and organizations. Similarly, the Real Estate Bar Association has created substantive law committees to educate and promote discussion among members about topics in affordable housing, environmental law, and land use and zoning, for example.

Recently, REBA's Affordable Housing Committee had occasion to review a proposed citizens' initiative petition to repeal G.L.c. 40B. The attorney general is required by law to determine if a particular initiative petition is a proper subject for submission to the voters under Amendment Article 48 of the Massachusetts Constitution.

### Comprehensive permit law

In writing to Attorney General Martha Coakley, the REBA committee confined its objections regarding the proposed initiative petition to constitutional concerns, and specifically declined to opine on the public policy issues.

According to Section 2 of the petition, the proposed repeal of Chapter 40B shall not apply to projects receiving comprehensive permits from a board of appeals or the Housing Appeals Committee "before the effective date of this Act (i.e. January 1, 2009), provided that said project has been issued a building permit pursuant to the State Building Code for at least one (1) dwelling unit."

Theodore C. Regnante and Kurt A. James of REBA's Affordable Housing Committee wrote that the petition should not be certified as a proper subject of initiative petition by the attorney general, because the terms of the proposed repeal of the comprehensive permit statute would invalidate the vested property rights of any comprehensive permit holder who was not able to obtain a building permit prior to Jan. 1, 2009.

Regnante and James wrote that it was "clear that comprehensive permit holders have a property right which may not be taken without compensation," citing a U.S. District Court case and several Massachusetts cases. The petition indicates a "manifest intent to take the vested property rights of comprehensive permit holders who have not been able to obtain a building permit prior to the effective date." It is also manifest that the intent of the petition is to take the property rights of these comprehensive permit holders without providing compensation, as the petition contains no provision for payment of compensation to comprehensive permit holders whose permits become invalidated by the repeal of Chapter 40B.

The REBA committee urged the attorney general to refuse to certify the petition. Nevertheless, on Sept. 5, the attorney general gave Article 48 the more narrow reading that has been applied by her predecessors, and certified this and several other initiative petitions that were before her.

### Landlocked filled tidelands exemption

After the February 2007 decision of the

Continued on page 17

*Edward J. Smith has served as the association's legislative counsel and voice on Beacon Hill for over 20 years. He can be e-mailed at edwardjsmith@verizon.net.*

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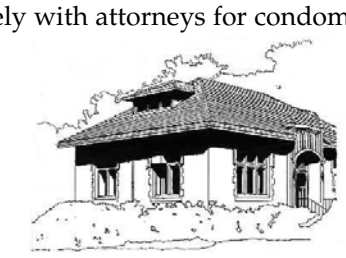

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# Study shows increase in amicus briefs

By Henry H. Thayer and Edward M. Bloom

THAYER

BLOOM

We believe that the Joint REBA/Abstract Club Amicus Committee's first brief was that submitted in the "Poodle Case" decision by Supreme Judicial Court Justice Herbert P. Wilkins. in *Johnson v. Keith*, 368 Mass. 316 (1975).

We may not have been a committee then.

The amici were Norman T. Byrnes (still a member) and Philip S. Lapatin. The court noted (fn 4): "We have been greatly aided in our analysis of the issues in this case, the first in this court under G.L.c. 183A, by the informative brief of the amici curiae."

The unit owner got to keep her yappy toy poodle.

The committee's membership varies from time to time in number and names. It has between a dozen and 20 members from around the commonwealth. It has no committee meetings where everyone gets together to discuss a case; it is done by mailings, e-mails and faxes. However, the committee has some requirements before it becomes the court's friend.

We will support only the right result. This leads then to the question of: What if the party supporting the wrong result comes to us first and we turn him down? Are we conflicted out if the next day the party who ought to win calls us and the case has an issue we want to take on? Our way of handling that first phone call is to ask for the pleadings and the trial decision without any oral argument by counsel.

The matter has to be one of broad interest and concern to the real estate bar. We are particularly protective of record title and accepted reliance on curative statutes in land use or title cases. The matter must not have so unusual a set of facts that an appellate decision won't stand for much. It must be at the appellate stage. We don't give free advice at the trial level. The committee has to be in near unanimity, but that isn't always so easy.

Related to that, if a committee member is in any way related to the case or the parties (say Byrnes is a bridge partner with the CEO of a corporate party), we simply blank out that committee member from all further deliberations.

There is a regular screening process for requested briefs. Requests come from lawyers around the state and sometimes by Supreme Judicial Court invitation to the chairperson, who makes the first determination in light of the requirements listed.

That screens out inappropriate requests or about half of those submitted. Matters not screened out, but still doubtful, are passed to a small group of second reviewers, which has been called internally "The Star Chamber" (the real one was abolished in 1641 — see Black's Law Dictionary). Most of those are dropped. The remaining half, less those dropped on second review, go to the committee as a whole for comment and volunteers for a brief. Finally, the REBA board must approve the filing of any brief.

Here is a list of all that Edward M. Bloom, REBA staff, an inquiry to the committee and Henry H. Thayer could put together.

### Conclusion

As you can see, briefing activity has increased in the new century. This is partly because of invitations from the SJC. We are reluctant to decline those invitations if the case subject is within our purview.

We are, in fact, amici curiae. Our clients are the appellate courts, not parties to appeals.

Effective with the publication of this article, Thayer steps down as chair (but remains a member) and Bloom takes over.

*A director of Boston-based Rackemann, Sawyer & Brewster, Henry H. Thayer has chaired the joint REBA/Abstract Club Amicus Committee since its inception in the mid-1970's. A former association president, he is a recipient of the Richard B. Johnson Award, the association's highest honor.*

*Edward M. Bloom has served as a de facto vice chair of the committee for a number of years. He also co-chairs the REBA Leasing Committee. He is a partner at Sherin and Lodgen in Boston.*

## REBA's briefed cases

| Case name | Amicus brief author(s) |
|---|---|
| *Johnson v. Keith*, 368 Mass. 316 (1975) | Byrnes and Lapatin |
| *Boston Waterfront Development v. Commonwealth*, 378 Mass. 629 (1979) | Jordan and William Rosenberg |
| *Kozdras v. LandVest*, 382 Mass. 34 (1980) | Byrnes and Driscoll |
| *Tetrault v. Bruscoe*, 398 Mass. 454 (1986) | Thayer |
| *Tattan v. Kurlan*, 32 Mass. App. Ct. (1992) | Thayer |
| *Jackson v. Knott*, 418 Mass. 704 (1994) | Healy, Pike and Byrnes |
| *In the matter of Concemi*, 422 Mass. 326 (1996) | Hoffman and Thayer |
| *Nylander v. Potter*, 423 Mass. 158 (1996) | Smithers and Piper |
| *Duclersaint v. Federal National Mortgage Assoc.*, 427 Mass. 809 (1998) | Looney and Gentilli |
| *McCarthy v. Tobin*, 429 Mass. 84 (1999) | Hoffman |
| *Capodilupo v. Vozzella*, 46 Mass. App. Ct. 224 (1999) | Thayer |
| *Kelly v. Marx*, 428 Mass. 877 (1999) | Byrnes |
| *Mass. Broken Stone v. Town of Weston*, 430 Mass. 637 (2000) | Gallogly |
| *Rogaris v. Albert*, 431 Mass. 833 (2000) | Bik and Stein |
| *Preston v. Zoning Bd. of Appeals of Hull*, 51 Mass. App. Ct. 236 (2001) | Smithers |
| *Queler v. Skowron*, 438 Mass. 304 (2002) | Mitchell and Galvin |
| *Rowley v. Mass. Electric*, 438 Mass. 798 (2003) | Thayer |
| *MPM Builders v. Dwyer*, 442 Mass. 87 (2004) | Bloom |
| *Doyle v. Commonwealth*, 444 Mass. 686 (2005) | Healy |
| *In the matter of Chimko*, 444 Mass. 743 (2005) | Salvesen |
| *Commonwealth Electric v. McCardell*, 66 Mass. App. Ct. 646 (2006) | Pike, and on further appellate review argued on Sept. 4, 2007, Thayer |
| *Moot, et al. v. DEP*, 448 Mass. 340 (2007) | Stay of effect of decision requested by Thayer |
| *Devine v. Nantucket*, 449 Mass. 449 (2007) | Thayer |
| *Northwoods Condominium* (condo phasing - on pending appeal to 1st Circuit) | Galvin and Marino |
| *Bank v. Thermo Elemental*, SJC - 09874 (pending appeal re: attorneys' fees in a 21E response) | Anderson, Kreiger and Wilkins |

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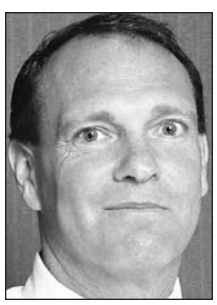
For more information or to subscribe, e-mail Joe McBride, REBA's member service administrator, at mcbride@reba.net.

# Community associations' disclosures complicated, unclear

By Thomas O. Moriarty
and Stephen M. Marcus



MARCUS

MORIARTY

*Thomas O. Moriarty and Stephen M. Marcus are partners at Marcus, Errico, Emmer & Brooks in Braintree. Moriarty, who chairs the firm's litigation practice group, also co-chairs REBA's Litigation Committee. He can be e-mailed at tmoriarty@meeb.com. Marcus practices in the fields of zoning and community association law. He writes and lectures extensively in the field. He can be e-mailed at smarcus@meeb.com.*

To disclose or not to disclose — that is the complicated and often murky question confronting community associations in their dealings with both current community residents and prospective buyers who are considering purchasing dwellings in the community.

Current owners, as members of the community association, are entitled to know almost everything about the community's finances, management and problems. Yet there are some exceptions, of course.

Privacy concerns dictate that boards should not publish the names of delinquent owners in a newsletter or other public location, although owners should be allowed to see those records on request. Privacy considerations also should bar access to the personnel files of association employees, although their salaries should be disclosed to owners, just as the salaries of local government officials are, and ought to be, a matter of public record.

Pending litigation represents another area where boards should limit the information they disclose to avoid divulging the association's strategy, possibly undermining its position. But apart from these relatively limited circumstances, disclosure to the owner-members of a community association is more often than not indicated.

## Legal cover

The legal and ethical landscape becomes more complicated when it is occupied by prospective buyers who are thinking of purchasing units in the community but do not yet own them.

The Uniform Condominium Act and the Uniform Common Interest Ownership Act require community associations to issue a resale certificate to buyers, providing essential information about the community association, including its budget, reserves, special assessments, insurance coverage and current or pending litigation. The resale packet must also include the condominium declaration as well as the association's by-laws and rules.

But in Massachusetts, which has not adopted the Uniform Condominium Act, associations do not have this disclosure guidance or the legal cover it provides, which leaves them in an uncomfortable position, caught between the often conflicting interests of buyers and sellers.

In an ideal world, everyone would disclose everything they knew, good and bad, about an individual unit and about the community as a whole. However, in the real world, where litigation is a constant threat, concerns about legal liability govern and limit how much community associations should disclose to whom.

The courts have ruled consistently that a contract for the purchase of a condominium unit is between the seller and the buyer exclusively. The community association (encompassing the board and the management company acting as the board's agent) is not a party to the transaction. As a result, it has no relationship with the buyer, and absent a specific statutory disclosure requirement (like that in the uniform condominium statute), the association has no legal obligation to provide information the buyer requests.

On the other hand, associations do have a legal relationship with the seller, and they could incur significant liability by disclos-

Continued on page 16

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# 2007 Annual Meeting and Conference

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Complete this form, include the appropriate fee and return to REBA Foundation, Attn: 2007 Annual Meeting and Conference, 50 Congress Street, Suite 600, Boston, MA 02109-4075 or FAX to: (617) 854-7570.

**Register Online at www.reba.net**

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| _____ | YES, please register me. I am a REBA member in good standing. | $ 195 | $ 220 |
| _____ | YES, please register me as a guest. | $ 235 | $ 260 |
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| _____ | NO, I am unable to attend, but would like to purchase the Conference materials and a CD of the sessions. (Order by 11/13/07. Please allow four to six weeks for delivery.) | $ 190 | $ 190 |
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**SECTION: PLEASE COMPLETE: thank you**
BREAKOUT SESSION PREFERENCES: please rate (1-8) order of your preference:

_____ *The Thornier Side of Probate Transactions* (Maggiacomo, Ring)
_____ *Closing Surprises and Defaults - A Closing Attorney's Survival Guide* (Nathanson, Heaney)
_____ *The State of the Registries: a Panel of Registers of Deeds* (Buckley, Howe, O'Donnell)
_____ *Using the Massachusetts Mortgage Discharge Law: The New REBA Forms* (Pitt, DaCosta, Haller)
_____ *Who's Got the Power? What Conveyancers Need to Know about Authority Documents* (Weissman, Armstrong)
_____ *Friends or Foes - Evolving Relationships between Senior and Junior Debt in Intercreditory Agreements* (Mansour, Gewurz)
_____ *Legislative Update of Recent and Pending Legislation: Summary and Highlights* (Smith, Kehoe)
_____ *Recent Developments in Massachusetts Case Law* (Lapatin)

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**FROM NORTH:** Take 495 S and take Exit 25B. Take 290 W and take exit 16. Right at end of ramp. At 3rd set of lights (Major Taylor Boulevard) the DCU is on your left.

## THE BREAKOUT SESSIONS

The Thornier Side of Probate Transactions

The State of the Registries: A Panel of Registers of Deeds

Who's Got the Power?, What Conveyancers Need to Know about Authority Documents

Closing Surprises and Defaults - A Closing Attorney's Survival Guide

Friends or Foes - Evolving Relationships between Senior and Junior Debt in Intercreditory Agreements

Using the Massachusetts Mortgage Discharge Law: The New REBA Forms

Legislative Update of Recent and Pending Legislation: Summary and Highlights

Recent Developments in Massachusetts Case Law

## CONTINUING EDUCATION COMMITTEE CHAIRS

Stephen M. Edwards, Esq.
Sophie Stein, Esq.

**A COMPLIMENTARY CD** *of the REBA Guide to the Massachusetts Registries of Deeds, Fourth Edition, will be included with your handouts at the 2007 Annual Meeting & Conference. Be sure to get your copy at the registration table, second floor of the DCU Center.*

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**Tuesday, November 13, 2007**
**8:00 a.m. – 3:00 p.m.**

SCHEDULE OF EVENTS

8:00 a.m. - 3:00 p.m. **Registration and Exhibits Open**

9:00 a.m. - 1:00 p.m. **THE BREAKOUT SESSIONS**

9:00 a.m. - 9:45 a.m.
11:00 a.m. - 11:45 a.m.

### *The Thornier Side of Probate Transactions —*

**Jennifer A. Maggiacomo, Assistant Register Middlesex Probate and Court; Michael J. Ring, Esq.**

When a real estate transaction involves the Probate & Family Court, a host of issues emerge. This discussion will address necessary, and unnecessary, court involvement and tips on navigating your way through the maze. Topics include: death related liens, ancillary administration and sales by foreign fiduciaries, the effects of divorce, conveyances by special masters and commissioners, specific enforcement and curing title defects, as well as practical tips for a good, timely, probate conveyance.

9:00 a.m. - 9:45 a.m.
11:00 a.m. - 11:45 a.m.

### *Closing Surprises and Defaults - A Closing Attorney's Survival Guide —*

**Stefan M. Nathanson, Esq.; Michael E. Heaney, Esq.**

As real estate professionals, we have all heard horror stories of things that went wrong, or could go wrong in the closing process. Some "traps" and common mistakes can be looked out for and avoided, but some last minute problems can just arise on their own as part of the human element in every transaction. Managing these unavoidable surprises, defaults and conundrums at the closing table is a test of the conveyancer's professional mettle. Our experienced panelists share approaches for how to deal with unexpected closing dilemmas.

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

### *The State of the Registries: A Panel of Registers of Deeds —*

**John R. Buckley, Jr., Esq., Plymouth Register; Richard P. Howe, Jr., Esq., Northern Middlesex Register; William P. O'Donnell, Esq., Norfolk Register**

Our distinguished and experienced panel of Registers of Deeds will discuss developments and issues of registry operations and practices affecting the real estate bar. Specific topics will include the digitization of land records, the likelihood of a completely paperless registry, electronic recording, and the Massachusetts Deed Indexing Standards. This session will emphasize audience participation, so please bring all your registry questions and concerns.

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

### *Using the Massachusetts Mortgage Discharge Law: The New REBA Forms —*

**Christopher S. Pitt, Esq.; Mandee J. DaCosta, Esq.; Martin R. Haller, Esq.**

During the business portion of this afternoon's REBA Annual Meeting and Conference, the Title Standards Committee will present a complete set of forms to be used in implementing the new Massachusetts Mortgage Discharge Law (Chapter 63 of the Acts of 2006). The panel at this breakout session will introduce the new forms, explain how they were developed, discuss the successes and difficulties practitioners have experienced in using the draft versions, and offer suggestions for making the forms and the Discharge Law work efficiently in your practice.

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

### *Who's Got the Power? What Conveyancers Need to Know about Authority Documents —*

**Nancy M. Weissman, Esq.; Frederick S. Armstrong, Esq.**

Authority documents can be the last-minute tripwire for closings. Different requirements for different types of entities, with different requirements for Registries of Deeds and Land Court; individuals, corporations, partnerships, limited partnerships, LLC's, LLP's and six different kinds of trusts. Who can do what? How you know? What you need to get? What you need to record? What does the title company require? What should you require for prudent due diligence, even if the title company doesn't require it? This informative session will help you sort out the differing requirements and types of authority documents.

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

### *Friends or Foes - Evolving Relationships between Senior and Junior Debt in Intercreditory Agreements —*

**Lauree M. Mansour, Esq.; Zev D. Gewurz, Esq.**

Over the last few years, so-called mezzanine and second lien financing has risen to new heights of popularity and levels of sophistication. The structure of mezzanine capital is limited only by the creativity of the participants and their counsel. This session will explore some of the key elements that are likely to arise in the preparation and negotiation of any intercreditor agreement, as seen from the perspective of both the senior and junior lenders.

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

### *Legislative Update of Recent & Pending Legislation: Summary and Highlights —*

**Edward J. Smith, Esq.; E. Christopher Kehoe, Esq.**

You won't want to miss this twice yearly update from REBA's long-time Legislative Counsel, Ed Smith and the Chair of the Legislation Committee, Chris Kehoe on the recent and pending legislation on the Hill. Ed Smith gives us up-to-date going's on up on the Hill, affecting REBA members and Chris Kehoe discusses the inner-workings of REBA's Legislation Committee. Topics will include pending legislation on: former tidelands and c. 91 licenses; regulation of notaries and witness closings; condominium topics, mortgage foreclosures, proposed c. 40B repeal, the Mass. homestead law and other timely issues.

12:00 p.m. - 1:00 p.m.

### *Recent Developments in Massachusetts Case Law —*

**Philip S. Lapatin, Esq.**

Phil Lapatin draws a huge crowd with this session every meeting. Now, you won't have to stay late to hear him. His timeslot is right before lunch. His session, Recent Developments in Massachusetts Case Law is a must hear for any practicing real estate attorney. Due to standing room only at our last two seminars, we will project a live video feed from Phil's session to a second breakout room.

1:15 p.m. - 2:40 p.m. **Luncheon Program**

1:20 p.m. - 1:30 p.m. **REBA President's Welcome -Sami S. Baghdady, Esq., President**

1:30 p.m. - 1:45 p.m. **REBA Business Meeting**

1:50 p.m. - 2:20 p.m. **Keynote Speaker**

**Martha Coakley, Massachusetts Attorney General.**

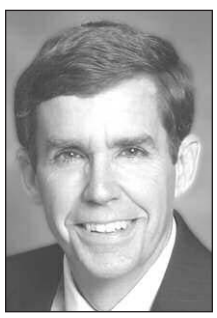
2:40 p.m. **Adjournment**

## 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 to REBA's 2007 Annual Meeting and Conference is open to REBA members/associates in good standing, their guests and non-members/associates (for an additional fee). Everyone attending the 2007 Annual Meeting and Conference 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 on our website www.reba.net or by emailing Joe McBride at mcbride@reba.net. Confirmation of registration will be sent to all registrants by email or mail. Name badges and a list of registrants will be available with program materials.
- Registration with the appropriate fee should be sent by website, mail or fax to arrive prior to November 2, 2007 to guarantee a reservation at the Annual Meeting and Conference. Registrations received after November 2, 2007 will be subject to a late registration processing fee of $25. Registrations cancelled in writing before November 2, 2007 will be honored but will be charged a processing fee of $25. No other refunds will be permitted. Registrations cancelled on or after November 2, 2007 will not be honored, however, 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 4 to 6 weeks after the program.
- The use of cell phones and pagers is prohibited in the meeting rooms during the programs.

# ‘Tipping point’ reached on electronic recordings

**By Richard P. Howe Jr.**



In his best selling book, “The Tipping Point,” Malcolm Gladwell posits a theory that explains why change in society happens as quickly and unexpectedly as it does. He suggests that ideas and products behave just like outbreaks of infectious diseases — they start with a few cases and suddenly explode across the population.

That breakout moment is the tipping point.

For two years at the Middlesex North Registry of Deeds, as part of a statewide pilot program, we have watched electronically submitted documents trickle in at a leisurely pace, mostly from a handful of large mortgage companies. Since early August, however, interest in this new technology has exploded.

Electronic recording has reached its tipping point in the commonwealth.

Electronic recording can occur in several different ways. The most common involves the customer at a distant location scanning an original paper document that contains original signatures and transmitting an electronic package (the document image and some data about the document) to the registry of deeds by a secure internet connection that is hosted by a registry-authorized intermediary company. A few seconds after the customer clicks the “send to the registry” button on the office computer screen, the document image pops up on a recording terminal at the registry where we verify that it is at the correct registry, that it’s not registered land and that the document image is legible. If everything is in order, we simply press the “record” button and the document is on record without any scanning or data entry by registry personnel.

Back at the law office, the customer receives an electronic receipt and an electronic copy of the recorded document within minutes. Fees are paid by a once-per-day electronic bank transfer to the registry’s bank account. Free from all tasks normally associated with document recording — data entry, scanning, cashiering, document mail back — the recording process moves at lightening-quick speed.

There are several reasons why electronic recording is catching on now. Previously, just one company, eRX, was available as an intermediary for the submission of electronic documents. This summer, we have added three more companies — Simplifile, Ingeo and Stewart Title — to our list of authorized intermediaries. The resulting competition has created a sense of urgency as each company seeks to signup early adopters of this new technology.

Another reason for rising interest in electronic recording is the changing nature of conveyancing. Now that home mortgages have become just another commodity to be funneled to Wall Street for repackaging, the speed with which the transaction is consummated and the documentation routed to the investment bankers becomes crucial. Every aspect of the mortgage process is automated except for recording.

My sense is that the mortgage industry is applying pressure on conveyancers to remove that speed bump by moving to electronic recording as quickly as possible.

In a strange way, the current real estate slowdown has also contributed to this newfound interest in e-recording. A

*A frequent and welcome contributor to REBA News, Richard P. Howe Jr. is register at the Middlesex North District Registry of Deeds. He will participate in a program entitled “The State of the Registries: a Panel of Registers of Deeds” at REBA’s AMC07 on Nov. 13 in Worcester. He can be e-mailed at richard.howe@sec.state.ma.us.*

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lawyer doing 10 closings per day two years ago didn't have time to learn and adopt new technologies; with only 10 closings each week these days, that same lawyer has more time to investigate a new way of doing things.

Like the early stages of any new technology, potential users have many questions. The one asked of me most often is "how do you know that an electronically submitted document is authentic?"

There are a number of security measures in place to reduce the risk of a fraudulent recording. The intermediary company must establish and maintain a secure connection between the submitter and the registry. The intermediary must also authenticate its submitters through an industry-standard level of password and login security. Security is further enhanced by restricting submitters to specific classes of registry users.

To be an electronic document submitter, you must be an attorney licensed in Massachusetts; a title insurer; an institutional lender; or a governmental entity. Despite these measures, however, there is no guarantee that a document is authentic. Of course, nor is there a guarantee that a paper document submitted at the recording counter is authentic.

Since we are so familiar with paper documents, we put that risk in the proper context and are not unduly concerned about it. As electronic recording becomes more familiar, concerns about it will also be put in the proper context and everyone's comfort level will increase accordingly.

While this registry does not endorse or recommend any intermediary company, you may obtain information about the respective services they provide by calling Paula Steger of eRX at (214) 887-7473; Paul Roth of Simplifile at (781) 552-1148; Greg Brown of Ingeo at (770) 643-9920; or Mike Agen of Stewart Title at (800) 732-5113.

For general information about electronic recording and how this registry has implemented it, call (978) 322-9000, e-mail lowelldeeds@comcast.net or log on to www.lowelldeeds.com/blog.

# Special program: How to keep in-house corporate counsel happy

Continued from page 1

president of government relations and as special counsel. He holds a B.S. in political science and history from the University of Massachusetts/Boston; an M.A. in government and management from Northeastern University; and a J.D. from Suffolk University Law School. He was awarded a Loeb Fellowship in Advanced Environmental Studies at Harvard University. Geary is admitted to the bar in Massachusetts and the District of Columbia, as well as the bar of the U.S. Supreme Court.

Bailin is a graduate of Wellesley College and Harvard University Law School. A member of the bar since 1981, she is admitted to practice in the U.S. District Court for the District of Massachusetts and the 1st U.S. Circuit Court of Appeals.

Friedman is a graduate of Harvard College and Harvard Law School. He has served as counsel and chief policy advisor to former Senate President Robert E. Travaglini. He has also served as a law clerk in the 1st U.S. Circuit Court of Appeals and the U.S. Supreme Court.

To register for the program, e-mail Nicole Cunningham at cunningham@reba.net. The registration fee, which includes the post-program cocktail reception, is $30 for members and $50 for non-members.

A full list of panelists and their bios can be found on our website, www.reba.net.

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See details on pages 10 - 11


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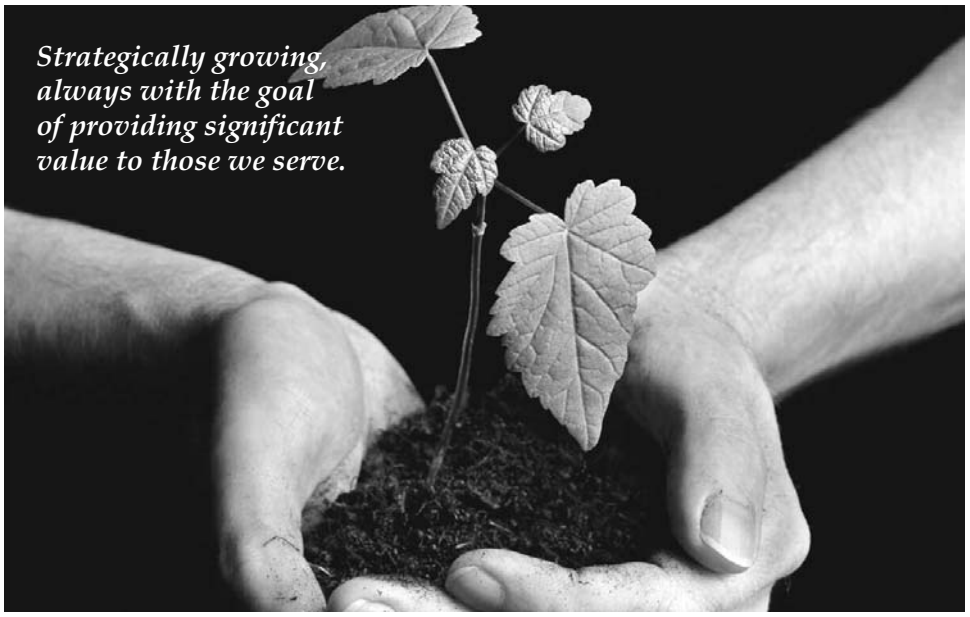


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# Updated guide to registries of deeds now available

The REBA Guide to Massachusetts Registries of Deeds, first published by the Massachusetts Conveyancers Association in 1989, has been released in a fourth edition, available on the REBA website and in CD format.

"The guide, in electronic format, is truly a 21st century resource for our members," said Wendy M. Fiscus, co-chair of the REBA Registries Committee. "Unlike the earlier print editions of the Guide, we can now offer far more frequent updates and revision."

The guide is a highly detailed compilation resource for those in the conveyancing community who may find themselves dealing with an unfamiliar registry. Routines and unique practices of each registry are highlighted in the guide.

The fourth edition was prepared by Fiscus and Richard M. Golder, also a co-chair of the Registries Committee. A debt of gratitude is owed to former Registries Committee Chair Joel A. Stein, who prepared the first three editions of the guide and participated in the preparation of the fourth edition.

As a special bonus, every registrant to the association's Annual Meeting and Conference on Tuesday, Nov. 13, at the DCU Center in Worcester, will receive a free CD of the guide. Attorney General Martha Coakley will be the event's luncheon keynote speaker.

To register for the AMC07, log on to www.reba.net.

# REBA wins early discovery battles against NREIS

Continued from page 5

tion revealed by the list is striking.

NREIS has participated in over 7,000 residential real estate closings or transactions throughout Massachusetts during the past three years. NREIS' activities also appear to be escalating. The volume of NREIS real estate transactions in each of the past two years is more than double the volume of transactions that occurred from July 2004 through July 2005. The sheer magnitude, and increasing number, of these transactions only serves to underscore the importance of REBA's fight against the unauthorized practice of law in this litigation and elsewhere.

REBA's litigation counsel are in the process of selecting a representative sample of the more than 7,000 NREIS transactions so that further and more detailed information can be requested from NREIS regarding those specific transactions.

Thereafter, REBA anticipates taking the depositions of NREIS officials and personnel responsible for reviewing title, preparing closing documents, conducting closings, recording deeds, mortgages and discharges, and disbursing funds with respect to those transactions.

REBA and its counsel expect that the information uncovered during the discovery process will conclusively establish that NREIS, as alleged, is engaged in the unauthorized practice of law.

As this litigation continues, REBA members who may have knowledge of NREIS' activities in Massachusetts are invited to contact REBA's unauthorized practice of law e-mail address, upl@reba.net.

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# 'Moot v. DEP': where we are today

Continued from page 6

ditional approvals are needed for current and future projects.

The SJC stayed the effect of its decision for 180 days, giving the Legislature time to act if it so chooses. The stay was set to expire in September 2007, but the SJC granted a 60-day extension of the stay on Sept. 4.

Shortly after the issuance of the *Moot* decision, the governor filed legislation in an attempt to preserve the exemption for landlocked tidelands and to quell any questions relative to existing developed properties. Thereafter, different versions of legislation addressing the issue emerged in the Senate (S.2309) and the House (H.4184). House and Senate conference committees were established on Aug. 16, to reach a compromise on the legislation.

A final version of the bill is still pending.

In the interim, the DEP is in the process of drafting new regulations relative to landlocked tidelands that it has indicated will be consistent with the SJC's ruling, yet provide a more streamlined permitting process. It is anticipated that the new regulations will be available for public comment in early September 2007.

For further information please e-mail Deborah A. Eliason at deliason@bdlaw.com.

# Professional liability insurance launched for members

A new member benefit, especially designed for small firms and sole practitioners with transactional practices, will be introduced to Real Estate Bar Association members before the end of the year.

The program is the result of a two-year effort by association leaders and staff to secure vendors who will offer broad coverages at favorable premium rates. A sampling of REBA members offered their current professional liability policies and premium structure for review and analysis to craft policy coverages and rate structures to best serve transactional lawyers.

"We want REBA to become the principal — the sole — bar association home for all business, real estate and transactional practitioners," said Greg Eaton, chair of the group's Membership and Public Relations Committee. "This new core member benefit will bring us closer to that goal."

The program has been developed by The Renaissance Group, with the collaboration of several underwriters, including The Hartford.

Information will be available to attendees of the association's Annual Meeting and Conference on Tuesday, Nov. 13, as well as on the REBA website, www.reba.net.

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## Send a letter to the editor!

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

# Community associations' disclosures complicated, unclear

Continued from page 9

ing adverse information that leads a buyer to reject a planned purchase.

### Managing the risks

Associations face a similar potential conflict in dealing with requests for information that lenders require — about owner-occupancy ratios, reserves, budgets and special assessments — before they will approve a mortgage on a condominium unit.

Associations are advised to provide certain disclosures on the association's form, not the lender's, and to specify that the information is intended for the lender only and is not to be shared with the buyer. It is also suggested that associations add a disclaimer stating that while the association believes the disclosures to be accurate and complete, the lender should verify the information independently. A similar approach can manage the risks of disclosing information to buyers as well.

Sellers have an obvious interest in providing, or making available, the detailed information buyers demand, or ought to demand, before they purchase a unit. A pre-purchase home inspection will identify problems in an individual unit, but it can't possibly tell buyers everything they need to know, or much of anything they need to know, about the condition of the common areas, the stability of the association's finances or the quality of its management. That information can come only from the community association.

To protect themselves, boards should have sellers sign a statement authorizing the association to answer buyers' questions, relieving the association of liability if buyers don't like the answers. Associations should seek similar indemnification from buyers, in the form of a statement asserting that they understand the need to verify the information independently and will not hold the association liable for disclosures it makes or fails to make.

### Don't tell if they don't ask

Under this structure, the association has an obligation to respond accurately and truthfully to all questions asked, but it has no obligation to volunteer information the buyer does not request. While this approach addresses the legal liability concerns, it doesn't address the ethical and practical problems that can arise if the association is aware of serious problems but the buyer does not ask specifically about them.

For example, what if the association knows the sellers are moving because they can't tolerate the noisy and offensive neighbor living above them? Or what if the association is planning to file a construction defect suit against the developer — something even the seller may not know? The disclosure issues are troubling, but they are equally troubling on both sides.

The discovery that the association withheld relevant adverse information won't make for particularly cordial relations between the new owners and the association in the future. And a belief that they have a moral obligation to "do the right thing," or simply a fear that the disgruntled buyers may file suit against them, may lead some boards to conclude that they should tell all.

But if a board kills the sale by disclosing information about issues beyond the scope of the disclosures the seller has authorized, it breaches the association's duty to the seller, and that is the only duty the courts have recognized.

Associations can deal with extraordinary situations — and an abusive neighbor might qualify — by putting the seller on notice that if the buyer asks an open-ended question, such as: "Is there anything else I should know?" the association will be compelled to mention the problem.

But absent a specific query and knowledge of an extremely serious, material issue, associations should answer only the specific questions buyers ask. They should answer those questions honestly, but they should not volunteer information that buyers don't request.

### Lead paint exception

There is one little-known and probably little-heeded exception to this general rule. The Department of Housing and Urban Development adopted regulations in 1996 requiring condominium and cooperative associations to inform potential buyers or renters of the presence of lead paint in individual units or common areas, and to provide federally approved pamphlets describing the dangers of lead poisoning in children.

But this is the only unsolicited disclosure associations should provide.

Unsatisfactory though these constraints may be for some boards in some circumstances, associations run a far greater risk of being sued successfully by a seller for disclosing too much than of being sued successfully by a buyer for failing to disclose information they had no legal duty to provide.


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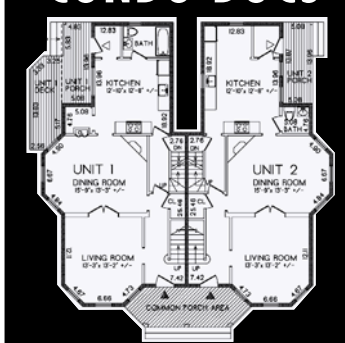

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# Legislative update: committees address 40B, tidelands

Continued from page 7

Supreme Judicial Court in *Moot v. Department of Environmental Protection*, Gov. Deval L. Patrick filed H. 3757, legislation supported by REBA to reinstate a long-standing, regulatory program at the Department of Environmental Protection that had exempted landlocked filled tidelands from G.L.c. 91 licensing.

Apart from the appellants in the *Moot* case, this successful program had gone unquestioned for over 16 years. The court's decision upset a number of long-settled legal practices. More specifically, the so-called "landlocked tidelands licensing exemption" in the 1990 DEP regulations was a wise decision by the expert agency delegated by the Legislature to implement the public trust in waterways and tidelands.

The DEP correctly decided that some of the former tidelands, filled so long ago in Boston, Cambridge, Salem, Newburyport, Gloucester, Fall River, New Bedford and other coastal cities, are now so far from the water that there is no reasonable, practical way for the public to use the former ocean as a public highway or for fishing, fowling or navigation.

As Gregor I. McGregor, co-chair of REBA's Environmental Law Committee, stated in remarks to the Joint Committee on Environment, Natural Resources and Agriculture, "the exemption was a sensible allocation of limited state resources, allowing DEP to focus its licensing efforts near the current water's edge where real development proposals were and are pending, putting serious pressure on the waterfront. This is where those efforts can and do produce valuable, functional public access and other amenities, which if left unregulated would lead to excessive privatization of public resources. This is better than divining the ancient conditions and colonial fishing beneath the South End or Prudential Center that are built on filled tidelands.

... Not until the *Moot* case has anyone raised [the] legal validity [of the landlocked tidelands licensing exemption]."

The REBA statement went on to say: "This legislation is what the Supreme Judicial Court invited. Its decision in the *Moot* case simply ruled that the Legislature, which is in charge of public rights in tidelands, has not actively approved the exemption in the wording of Chapter 91. Therefore, the statute controls. If DEP's landlocked tidelands exemption provision makes sense as public policy, and the SJC does not disagree with the public policy behind DEP's provision, the Legislature merely needs to say DEP has the authority for its regulation, i.e. the authority to decide not to exercise its jurisdiction over landlocked tidelands."

The legislation is "narrowly focused to restore the DEP landlocked tidelands exemption program. The bill would not change any wetlands law or regulation, eliminate any parkland or public access, give up any meaningful public right, or change the direction or mission of the DEP. It would leave intact the entire array of federal, state, and local environmental and land use laws such as the Wetlands Protection Act, water pollution and storm water rules, zoning and subdivision controls, water supply and groundwater laws, forestry and farmland preservation, historic and archeological protection, water withdrawal and interbasin transfer laws, open space and parkland protections, solid and hazardous waste rules, waterways and Great Ponds laws, and environmental reviews under MEPA, not even to mention the enactments of the Cape Cod Commission and other regional authorities, Home Rule bylaws and ordinances of towns and cities, and all the financial programs for land acquisition and funding including the Community Preservation Act."

**REBA STATEMENT:**

**"This legislation is what the Supreme Judicial Court invited. Its decision in the *Moot* case simply ruled that the Legislature, which is in charge of public rights in tidelands, has not actively approved the exemption in the wording of Chapter 91. Therefore, the statute controls.**

Over the summer, the House and Senate each passed a version of H. 3757, as a result of which a joint House-Senate Conference Committee was appointed to reconcile the differences. As of this writing, the SJC had extended the stay of its ruling in *Moot* for another 60 days — to roughly the first week in November, with the expectation that a final bill will reach the governor's desk by that time.

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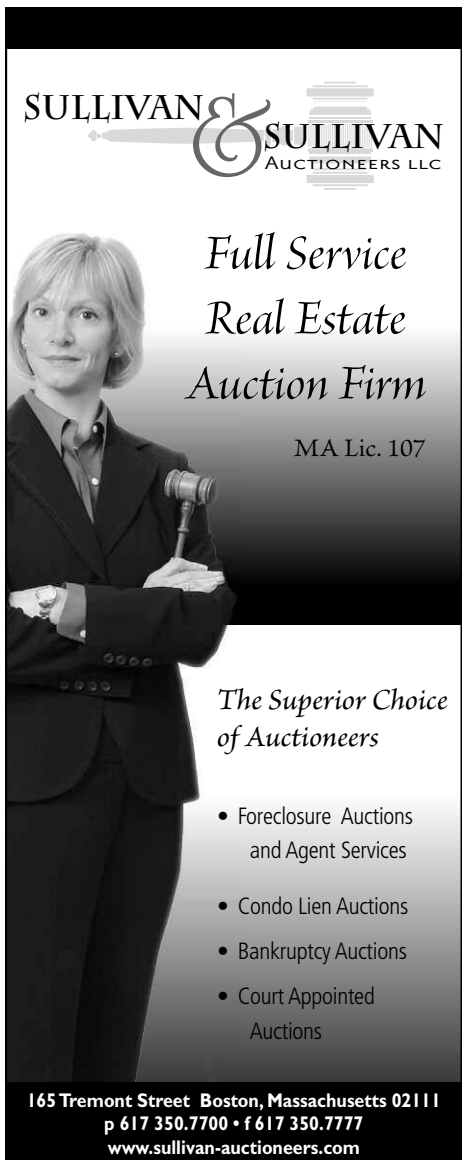



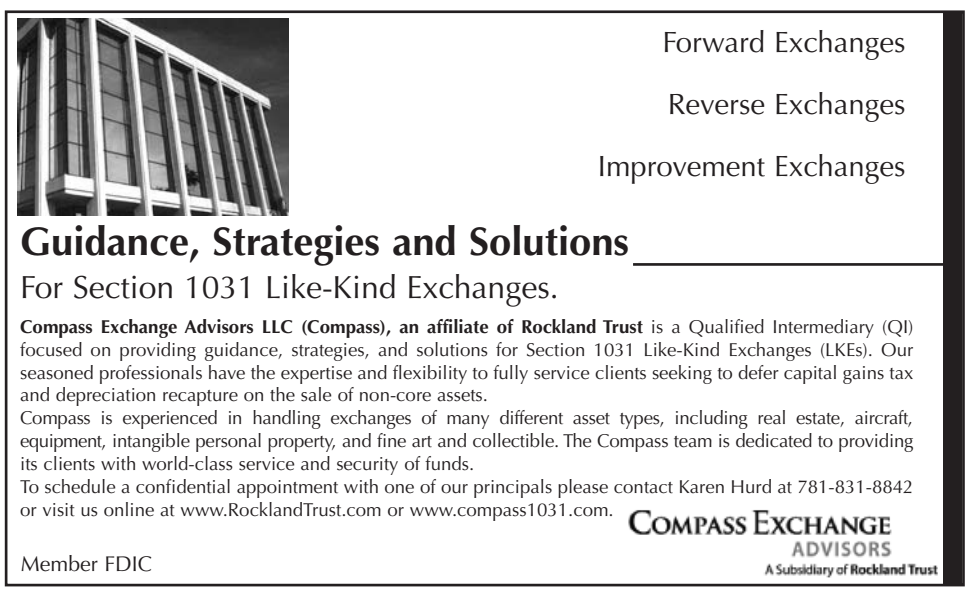

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# IOLTA and escrow accounts 101

Continued from page 4

money received and paid out on behalf of the client or third party, and show the client's balance following every receipt or payment.

Every receipt and payment of money for a client must be recorded in the ledger for that client matter. For every receipt, list the date, amount and source of the money. For every payment, list the date, amount, check number, payee and purpose of the payment. After each receipt or payment is recorded, the new balance held for the client must be recorded.

### 'Law firm' ledger for bank fees and charges

Rule 1.15(f)(1)(D) requires lawyers to record every bank charge against the client trust fund account in the corresponding check register and permits the lawyer to keep his or her money in the account to pay these charges and fees. Therefore, create a separate ledger of the firm's funds, label it as such, and use it in the firm management system to record every deposit of the lawyer's funds, every charge the bank makes against the account, and the running balance in both the client ledger and the check register.

### Check register

Lawyers must have a separate check register for each account; there are no exceptions. Rule 1.15(f)(1)(B) requires that a check register be in chronological order; show the date and amount of all deposits; contain the date, check or transaction number, amount and payee of all disbursements whether by check, electronic transfer, or other means; show the date and amount of every credit or debit; and identify the client matter and the current balance in the account.

### So-called 'three-way' reconciliation

A three-way reconciliation under Rule 1.15(f)(1)(E) requires the lawyer to add all of the individual client ledgers and the firm's ledger for bank charges and compare the total of the ledgers to the balance in the check register. Both amounts should be the same. If they are not, the basic records — bank statements, client ledgers, bank charges ledger and the check register — need to be checked for mistakes and corrected.

When both amounts are the same, the lawyer should reconcile the amount against the bank statement in the usual

Continued on page 19

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# Borrower's interest statute: a potent weapon?

Continued from page 1

never have made under the statute, and perhaps avoid a foreclosure.

### Safe harbor provisions

Under his statutory authority, the commissioner of banks has identified four types of refinanced loans that are deemed to be "in the borrower's interest" (209 C.M.R. 53.04):

- FHA loans: The refinanced loan is guaranteed, originated or funded by the Federal Housing Administration, the Department of Veteran Affairs or other state or federal housing finance agencies;
- Interest rate ceilings for close-end loans: The refinanced loan is secured by a first lien and has an interest rate that is not more than 2.5 percent points above the U.S. Treasury security with a comparable maturity period (3.5 percent points if the refinanced loan is secured by a second lien). With respect to variable rate mortgages, the Division of Banks has indicated that the rate on variable rate loans should be calculated as a single composite rate in the same manner as under the federal Truth in Lending Act, and cannot be based on the initial teaser rate;
- Interest rate ceilings for open-end loans: The refinanced loan is an open-end loan (an equity loan) and has an interest rate that is not more than one percentage point above the prime rate index published in the Wall Street Journal; and
- Recoupment of refinancing costs: The refinanced loan allows the borrower to recoup within two years the costs and fees of refinancing from any savings in the monthly mortgage payments. The Division of Banks has specified that costs and fees are to be defined broadly and include yield spread premiums and prepayment charges. Presumably, costs and fees also include charges for title examination, appraisals, document preparation, title insurance premiums and recording fees. Using such a definition, few refinance loans will fall within this category.

*Douglas W. Salvesen is a partner at Yurko, Salvesen & Remz in Boston, which focuses on business litigation. He can be e-mailed at dws@bizlit.com*

### Determination of 'borrower's interest'

If a refinance loan does not fall into one of the "safe harbor" categories identified in the regulations, the lender is obligated to make a determination, based on policies and procedures the lender has developed, to determine if the loan is in the borrower's interest. For each loan, the lender is required to complete and retain a worksheet that indicates how the lender determined that the loan was in the borrower's interest.

The statute explicitly requires that the "borrower's interest" standard be construed narrowly. Without restricting the inquiry, the statute identifies six, non-exclusive factors (and the commissioner of banks has included an additional seventh factor) that are to be considered in determining if the refinanced loan is in the borrower's interest:

- The borrower's new monthly payment is lower than the total of all monthly obligations being financed, taking into account the costs and fees;
- There is a change in the amortization period of the new loan compared to the original amortization term of the old home loan;
- The borrower receives cash in excess of the costs and fees of refinancing;
- The borrower's note rate of interest is reduced;
- There is a change from an adjustable to a fixed rate loan, taking into account costs and fees;
- The refinancing is necessary to respond to a bona fide personal need or an order of a court of competent jurisdiction; or
- The time it takes to recoup the costs of refinancing, taking into account the costs and fees.

Lenders are likely to argue that the refinanced loan is necessarily in the borrower's interest if any one of these seven factors are met. However, the statute and the regulations both specify that the lender's inquiry is not to be limited to these listed factors, and borrowers will counter that other factors should be considered.

### Consider ability to repay loan

Although not listed as a factor, the regulations suggest that the borrower's ability to repay the refinanced loan should be considered by the lender. The regulations require the lender use "sound underwriting practices" in making the loan (209 C.M.R. 53.05). Sound underwriting practices, and simple common sense, require that the borrower be able to repay.

Similarly, under HOEPA, a lender is required to determine if the refinanced loan is "in the borrower's interest" and may not make the loan based on the collateral value of a property without regard to the borrower's ability to repay.

In fact, a recognized cause for the mortgage foreclosure crisis is a lack of sound underwriting standards. Until recently, an approval of a refinanced loan was often based not on the borrower's long-term ability to repay, but on his ability to repay the loan at the initial "teaser" interest rate. Because these loans were not held by the original lender, but were "securitized" and sold in bulk to investors, the lender had little or no incentive to determine if the borrower had the ability to repay the loan. Where the lender has made a loan to a borrower that it knew — or should have known — could not be repaid, it is likely that the lender has violated the statute.

There are, of course, limits as to what factors a lender should consider in making a determination of the borrower's interest. For instance, the statutory requirement that the lender not "knowingly" make such a loan precludes any subjective factor that was not disclosed to the lender or its agent. Other questions also remain — such as whether the statute will survive a preemption challenge and whether the lender's determination of the borrower's interest will be accorded any deference.

These, and others, will certainly be addressed by the courts in the coming months and years of litigation.

Continued from page 18

manner of balancing any checkbook. The rule requires that client trust account records be reconciled at least every 60 days and that the attorney maintain a written record that shows the records were reconciled be kept.

We suggest monthly reconciliations to make sure that wires actually made it into the correct account, that funds held back or intended to be held in escrow are removed from the IOLTA account and put into separate accounts for the benefit of the parties, and that title insurance, discharge and recording checks can be tracked and do not linger for months or years without being negotiated or, worse, without being deducted, thereby leaving artificially inflated balances.

### Keep copies of reconciliation reports

Lawyers must keep a copy of the reconciliation reports of the client ledgers, bank charges ledger, check register and bank statements. It is not optional. An attorney will be required to produce those records to bar counsel if a grievance is ever filed.

While all of this may seem like a lot of work, it is essential for a practice that is smooth and in compliance.

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# Coakley to speak at Annual Meeting

Continued from page 1

cal and sexual abuse of children, including *Commonwealth v. Louise Woodward*.

In December 1997, Coakley resigned her position to campaign for Middlesex district attorney and was elected in 1998. During her eight years in that position, she established herself as a passionate advocate for public safety, not only bringing justice to crime victims and their families, but also emphasizing the importance of working with community leaders, schools and law enforcement in a variety of diverse and multi-faceted prevention efforts.

Under her leadership, the office's Child Abuse Prosecution Unit continued to serve as a national model for victim-centered prosecution of crimes against children. Coakley was also responsible for extending that model to sexual crimes against adults, establishing the Adult Sexual Assault Division in 2002.

During her tenure as district attorney, Coakley oversaw the successful prosecution of a number of high profile crimes, including the cases of several Catholic priests charged with sexually abusing children, the conviction of Michael McDermott on seven counts of first degree murder in connection with the workplace massacre at Edgewater Technologies in Wakefield, and the successful prosecution of Thomas Junta, the Reading father who fatally beat another parent at a youth hockey practice.

In January 2002, Coakley completed a one-year term as president of the Massachusetts District Attorney's Association, where she was at the forefront of statewide public policy discussion and initiatives to improve the criminal justice system and enhance overall public safety.

Coakley has continued to play an active role in advocating for legislative change on a variety of issues. She joined district attorneys and other members of the public safety community in urging the Legislature to provide additional funding for the Massachusetts State Police Crime Lab for enhanced DNA analysis capabilities. She also joined Senate President Robert E. Travaglini in advocating for changes in the law to streamline the approval process for academic and research institutions to conduct stem cell research.

Coakley has been involved in a number of community and professional organizations and boards. She is a former president of the Women's Bar Association of Massachusetts, and has served on the Board of Directors of the Dana Farber Cancer Institute. During her tenure as Middlesex district attorney, Coakley served as chair of the Board of Directors of Middlesex Partnerships for Youth, Inc., a non-profit organization committed to providing prevention and intervention resources and training to Middlesex school districts and communities.

Throughout her career, Coakley has been honored for her work by organizations such as the Association of Certified Fraud Examiners, Mothers Against Drunk Driving, the Massachusetts Association of School Committees and the Victim Rights Law Center. In 1998, she was named Woman of the Year by the Center for Women in Politics and Public Policy at the University of Massachusetts-Boston; in 2000 she received the Leila J. Robinson Award from the Women's Bar Association of Massachusetts; in 2002 she was selected a member of the YWCA Boston's Academy of Women Achievers; in 2004 she received the Greater Boston Chamber of Commerce's Pinnacle Award for Excellence in Management in Government; and in 2006 she was honored by the Massachusetts Democratic Party with its Eleanor Roosevelt Award.

Coakley regularly presents training and instruction at conferences and seminars, both in Massachusetts and nationwide. She has served as a guest lecturer for a number of colleges and universities, including Harvard University, Boston College Law School and Tufts University and has served as a guest lecturer for organizations such as the Columbia Law Review, the Massachusetts Municipal Association and the Massachusetts Medical Society.

In 2002, 2003 and 2006, she co-taught a winter study, "Law and Social Policy," at her alma mater, Williams College. She taught criminal trial advocacy courses at the Massachusetts School of Law and Boston University School of Law.

Coakley received a B.A., cum laude, from Williams College in 1975, and a J.D. from Boston University School of Law in 1979. She resides in Medford.

Registration information for the all-day conference can be found elsewhere in this issue of REBA News.


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