REBA NEWS

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The Newsletter of the
Real Estate Bar Association for Massachusetts

Class action filed against witness-closing companies

In early May, two members of the Real Estate Bar Association, Michael E. Katin and Alfred Geoffrion Jr., filed a class action in federal court against a number of witness-closing operations doing business in Massachusetts.

These out-of-state companies violate the Massachusetts law that defines conveyancing as the practice of law and statutory provisions that require the involvement of lawyers in the conveyancing process.

While Katin and Geoffrion have brought this action on their behalf and on behalf of other members of the real estate and conveyancing bar, their paramount interest is to insure that Massachusetts consumers receive the care and attention of a lawyer when buying or refinancing a home.

The plaintiffs allege that the defendants have engaged in illegal and unfair methods of competition and deceptive acts and practices by utilizing individuals and entities who are not Massachusetts lawyers, or engaging lawyers who have been divested of all meaningful responsibility to fulfill the same function as a notary public would in the conveyancing process.

The defendants have affirmatively and deliberately flouted the statutory and caselaw requirements that these practices be performed by Massachusetts lawyers.

While this action may bring unwelcome attention to the plaintiffs, they believe that they are acting in the best interests of the legal profession, and, more importantly, in the interests of consumers and homeowners in Massachusetts.

They expect to add additional defendants to the action and welcome information from other real estate lawyers practicing in Massachusetts.

The initial defendants in the action include National Real Estate Information Services, Inc.; ATM Corporation of American; First American Signature Services, Inc.; Trans State Closers, Inc.; Liberty Title & Escrow Co., Inc.; and Service Link, Inc.

NREIS, ATM and Service Link are headquartered in Pennsylvania. First American is based in Santa Ana, Calif., Liberty Title is in Rhode Island and Trans State is in Florida.

For a copy of the complaint, log on to www.reba.net/page/upl.

A long-time member of REBA, Michael E. Katin practices with Scheier in Acton. A graduate of Syracuse University and Suffolk University Law School, he can be e-mailed at mkatin@skactonlaw.com.

A leader of the Real Estate Bar Association for Hampden County, Alfred Geoffrion Jr. practices in Springfield. He also serves on REBA's Conveyancing Leadership Council. He can be e-mailed at ageoffrion@prodigy.net.

Reducing the 'risk of reversal': wire transfers and ACH credits

By Michael Dickey

In all purchase and sale transactions, but especially as the dollar value of the transaction grows, it becomes more and more important to the seller that the goods or real estate being sold remain their property until final payment is received.

The last thing a seller wants is to receive payment, pass title and then discover that the payment has been reversed.

Prudent sellers and their counsel are aware that personal or business checks can be stopped or returned due to insufficient funds, so two common alternative methods of payment employed by prudent sellers and their counsel are to require the buyer to transfer funds by wire transfer or ACH credit.

Both of these methods of payment reduce the risk of reversal. However, the question remains — do they eliminate all risk of reversal?

The short answers to this question: for wires, the risk is pretty much eliminated; for ACH credit, some risk remains.

Going beyond these short answers however, it is important to realize that the laws and rules governing wires and ACH credits are complex; it is not the intent of this article to provide a comprehensive analysis of all the issues involved.

Rather, it is to provide an overview of these two payment methods, the relevant rules regarding reversals and, hopefully, provide sellers with some thoughts to keep in mind that might help them choose between these two methods of payment.

Wire transfers

At its most basic level, a wire transfer is a fairly simple transaction. In the case of a purchase and sale, the buyer will instruct its bank to debit its account in the amount of the purchase price and credit those funds to the account of the seller.

The law calls the buyer's payment instruction to its bank a "payment order," but most everybody else calls it a wire. If the buyer and seller share the

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Retired Appeals Court judges join REBA Dispute Resolution

Recently retired Appeals Court judges Mel L. Greenberg, now of counsel with the Worcester-based firm of Seder & Chandler, and George Jacobs, now scholar in residence at the Southern New England School of Law, have both joined the panel of mediators/neutrals of REBA Dispute Resolution, a subsidiary of the Real Estate Bar Association.

JACOBS

GREENBERG

"We are delighted that judges Jacobs and Greenberg have joined our growing program," said REBA/DR President Robert J. Hoffman. "Their considerable experience on the appellate and trial court bench will be a great asset to REBA Dispute Resolution. With Seder & Chandler's offices in Worcester and Westborough, and SNESL's campus in North Dartmouth, we have additional out-of-Boston venues to serve our mediation and arbitration clients."

REBA Executive Director Peter Wittenborg added: "Now that REBA/DR has been approved to provide dispute resolution services to the Superior Court

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Developers bearing gifts - page 11

A Supplement to Massachusetts Lawyers Weekly

Froeb joins real estate practice of Nixon Peabody

Christopher R. Froeb, a REBA member since he passed the bar in 2005, has joined the Boston office of Nixon Peabody as an associate in the real estate group. He earned his B.A. from Boston College and his J.D., cum laude, from Suffolk University Law School.

GAO grades title insurance industry

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sections of the Home-Buyer Information Booklet on affiliated business and available title insurance discounts; evaluating the costs and benefits to consumers of title agents' operating as affiliated businesses; clarifying regulations concerning referral fees and affiliated businesses; and developing a more formalized coordination plan with state insurance, real estate and mortgage banking regulators on RESPA enforcement efforts.

These actions would improve consumer ability to shop for title insurance based on price and improve their ability to detect and deter violations of Section 8 of RESPA.

The study further recommends state insurance regulators strengthen the regulation of title insurance through means including licensing and continuing education; improving the oversight of title agents, including those operating as affiliated business through audits and data collection; and providing better information on title insurance prices to consumers.

While most in the industry agree that HUD should be given more power to cooperate with state regulators and to impose civil monetary penalties, ALTA Chief Counsel and Vice President of Public Policy Ed Miller believes that HUD should go one step further.

"Congress should amend RESPA to create a competitor's private right of action for injunctive relief under Section 8. The GAO report found that HUD and state regulators have limited resources for enforcement purposes," said Miller. "By creating a carefully drafted private right of action, Congress could, in effect, create 'private attorneys general' who could bring actions to stop illegal conduct. Industry participants are in the best position to see illegal activities in their communities. Empowering them to take action should yield positive results."

In Massachusetts, where title insurance agents are not licensed, we will need to see what the impact will be on our day-to-day practice. Also in Massachusetts, where attorneys comprise the vast majority of title insurance agents, affiliated businesses are rare.

However, given the adverse publicity the title insurance industry has received over the past two years, attorneys should be prepared to answer more questions on issues such as coverage, pricing and the nature of the product itself.

REBA member remarks on 'Moot'

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of public record in the registry of deeds and would not provide us with a basis for deletion of the exception from a policy that we might issue. Further, we would still need to list these title exceptions because, absent the existing landlocked tidelands exemption, c.91 jurisdiction will extend to changes of use and changes of structures on landlocked tidelands, and we could not be certain that an occupied structure had not undergone changes in its use or physical makeup over time. Moreover if such a "grandfathered" structure were to suffer a fire or other casualty, presumably any rebuilding would not be grandfathered, which is another reason we would feel compelled to disclose the exception on title certifications and title policies, both for owners and lenders, absent the current, broad form of exemption. For projects which are now in the midst of construction, we would need to include these title exceptions in all bring-down certifications and bring-down insurance endorsements associated with construction financing draws.

Please note that we believe that we need to include these c.91 and public rights exceptions on residential as well as commercial title certifications and title insurance policies, and on owner's as well as lender's title policies, written by us. We cannot be certain that lenders will continue to finance acquisition loans or construction loans with these exceptions showing on title policies and commitments and certifications for title policies, but we believe we are required to identify these exceptions as a matter of good legal practice, absent clear and unqualified legislative authorization for the existing DEP regulatory exemption for landlocked tidelands.

Sincerely yours,
Michael H. Marsh

A member of REBA and its predecessor association for his entire professional career, Michael H. Marsh is a leading expert on arcane and complex title issues in the commonwealth. A principle with the Boston firm of Marsh, Moriarty, Ontell & Golder, his practice concentrates on real estate title issues, including the negotiation of title insurance coverage and resolving title issues on behalf of title insurance underwriters and law firm clients. He can be e-mailed at mmarsh@mmoglaw.com.

'Paperless' Lowell registry supplies quality, efficiency

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this assembly line system to a more artisanal approach in which the employee who first records the document also scans it. This allows us to return the original document complete with affixed recording information to the customer just a few minutes after it was first presented for recording.

There's no denying that this process reduces the time for catching scanning problems, but the increased efficiency of this system requires us to fully move to this approach. With our low volume of recordings these days, this is the perfect time to implement this strategy and to discover safeguards and procedures that minimize, if not fully eliminate, the risk of scanning errors.

This movement away from paper is troublesome to some, but the rollout of any new technology has always been accompanied by similar unease amongst those comfortable with the traditional way of doing business.

But those who feel the registry is sacrificing quality for the sake of efficiency are mistaken, for this new method of doing business, if thoughtfully implemented and carefully executed, will allow both the registry and our customers to do our respective jobs better and faster.

REBA & CLE Publications

REBA Members …
- **Do you need a new set of our REBA Handbook of Standards and Forms…?**
- **Did you miss out on a Spring Seminar or Annual Meeting…?**

Order your REBA publications listed below by marking the box beside the desired item with the quantity and return to REBA.

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Includes all recent and pending legislation, recent case law developments and the popular morning breakout sessions:
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- Housing Court Practice: It's More than Evictions
- Nuts and Bolts: From title Abstract to title Commitment to title Policy and Insured Closing Letters
- Making Development of Affordable Housing Easier: the New Universal Affordable Housing Restriction and the SJC Ruling Limiting appeals of 40B Permits
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Includes all recent and pending legislation, recent case law developments and the popular morning breakout sessions:
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Includes all recent and pending legislation, recent case law developments and the popular morning breakout sessions:
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2004 Spring Seminar Syllabus $50
Includes all recent and pending legislation, recent case law developments and the popular morning breakout sessions:
- Bankruptcy Sales "Free and Clear"
- Bankruptcy Issues in Commercial Leasing
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Retired Appeals Court judges join REBA Dispute Resolution

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and the Housing Court in addition to the Land Court, judges Greenberg and Jacobs will bring greater depth to our panel and offer more options for our dispute resolution clients."

Greenberg served on the Appeals Court bench from 1990 to 2007 after many years of experience on the Trial Court bench. He served on the District Court bench from 1977 to 1983, in the District Court's Appellate Division from 1980 to 1983 and on the Superior Court bench from 1983 to 1990. Prior to 1977 he practiced law in Worcester.

A magna cum laude graduate of Clark University, he received his J.D. from Boston University School of Law and served in the Judge Advocate General staff of the United States Army Reserve.

Greenberg is a member of the Massachusetts Judges' Conference, the American Law Institute and the New England Appellate Judges' Conference. He has also served as chair of the Boston Bar Association's Bench-Bar Committee and as a faculty member of the National Judicial College in Reno, Nev.

Jacobs was an Appeals Court judge from 1989 to 2003. He previously served as a Superior Court judge from 1981 to 1989 and as judge of the Bristol County Probate & Family Court from 1975 to 1981.

Prior to these judicial appointments, Jacobs was engaged in private practice in New Bedford from 1958 to 1975. In addition, he was city solicitor of New Bedford from 1964 to 1970 and an assistant attorney general in Massachusetts from 1970 to 1974.

Throughout his career both on and off the bench, Jacobs has developed expertise across a broad spectrum of legal practice areas. Particular areas of specialty include family law, municipal law, commercial litigation and the law of medical malpractice.

Jacobs also has substantial teaching experience as a visiting lecturer and adjunct professor at several area law schools and universities. He has taught extensively about Massachusetts practice generally as well as business and labor law and the law of medical malpractice.

As scholar-in-residence at SNESL, Jacobs is working on a book about medical malpractice. Prior writings include co-authoring articles entitled "Will Contests" and "Sale of Personal Property," both published in the Massachusetts Probate Manual (1981).

In the course of his private practice, his work as city solicitor of New Bedford, and in his work as a judge of the Superior Court and the Appeals Court, Jacobs had many occasions to deal with real property and land use questions.

Jacobs' civic involvement includes membership in numerous non-profit and community organizations, including several New Bedford area and Jewish community groups.

Jacobs graduated from Harvard College in 1955 and Harvard Law School in 1958.

About REBA Dispute Resolution

Founded in 1995 to meet the alternative dispute resolution needs of the business and real estate communities, REBA Dispute Resolution's 20 neutral mediators offer a full range of dispute resolution services. REBA Dispute Resolution is an approved program in the Superior Court, the Land Court and the Housing Court. For more information about REBA Dispute Resolution and the Real Estate Bar Association, log on to www.reba.net.

Send a letter to the editor!

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Litigation update: suit against NREIS advances

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position of the case.

Counsel for both REBA and NREIS met in late May and agreed to a tentative schedule for exchanging documents, engaging in other discovery and, thereafter, conducting depositions of key witnesses through the summer and fall. The parties have also tentatively agreed to the filing of dispositive motions by year end, with a trial scheduled for early in 2008.

REBA's counsel are now engaged in preparing the case against NREIS, and anticipate 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 post-closing.

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

In addition to G.L.c. 221, §46A, the unauthorized practice of law statute, REBA anticipates referencing and relying upon G.L.c. 93, §70 which requires that, in connection with a residential purchase mortgage loan, the attorney for the mortgagee shall also render a certification of title to the mortgagor.

REBA and its counsel believe that, by statute and case law, it is clear in Massachusetts that conveyancing constitutes the practice of law and that NREIS' business practices will be found to be in violation of Massachusetts law.

Environmental hazards prove to be a concern in real estate management

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and animal testing need to be sterilized. Stained surfaces may require more aggressive decontamination methods, particularly concrete surfaces that readily absorb liquid.

Environmental testing of surfaces includes chemical analysis of "chip" samples or "wipe" samples to measure the concentration of hazardous substances that remain. Air-quality testing is the most direct way to determine the quality of indoor air. However, the presence of hazardous compounds given off by everyday commercial products present in a building can produce confusing results and misguided conclusions. For this reason, direct air-quality testing should be limited to only those substances of concern.

We are fortunate to have the vibrant industry of life sciences in Massachusetts. It is a unique industry that brings unique challenges to managing environmental health in the real estate it occupies.

Spring Conference 2007

More scenes from REBA's

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ACH credits

"ACH" stands for automated clearinghouse. It refers to a payment system in which funds are transferred in large batches via the electronic transmission of payment data between financial institutions.

However, rather than the data transmissions going directly from bank to bank (as is the case with wire transfers), a central clearing facility operated by a private organization or the Federal Reserve acts as the central node in a "hub and spoke" arrangement.

ACH transactions are governed by rules and guidelines promulgated by the National Automated Clearinghouse Association, or "NACHA."

NACHA rules and guidelines stipulate that the initiator of an ACH transaction (the "originator" in NACHA parlance) must enter into a contract with its bank (the "Originating Depository Financial Institution" or "ODFI") and that this contract contain a provision by which the originator agrees to be bound by the NACHA rules and guidelines. Therefore, NACHA rules and guidelines govern the ability of a buyer to reverse an ACH credit entry to the seller.

In addition to the buyer or originator, and the buyer's bank or ODFI, the other players in a typical purchase and sale transaction settled by means of an ACH transaction are: the clearing house or "ACH Operator" through which the ODFI sends a batch data file containing a number of individual ACH transactions or "entries," including the entry containing an instruction to credit the seller's account in the amount of the purchase price; the seller's bank or "Receiving Depository Financial Institution" or "RDFI"; and the seller or "receiver" of the ACH credit entry initiated by the buyer.

Pursuant to Article Two section 2.5 of the NACHA 2006 Operating Rules, a buyer who feels an ACH entry to the seller has been sent in error can initiate a "reversing entry" to it's bank (a.k.a. ODFI) to recall the erroneous entry. Not every entry can be recalled, however; the NACHA rules provide that only "erroneous entries" can be recalled.

The NACHA rules define erroneous entries as only those entries which fall into one of the following three categories: a duplicate of a previously initiated entry; an entry which orders payment to or from a receiver not intended to be credited or debited by the originator; or an entry that orders payment in an amount different than was intended by the originator.

Put another way, a buyer can only attempt to recall a payment made to a seller via an ACH credit if the buyer claims the seller was already paid by a previous ACH credit entry, or the seller was not the correct recipient of the funds or the original ACH payment was in the wrong amount.

A buyer requests its bank to reverse an ACH credit entry by initiating a reversing entry. When the ODFI acts on this instruction and submits the reversing entry to the ACH Operation, NACHA guidelines make it clear that the ODFI is warranting to the ACH Operator and the RDFI the appropriateness of this recall request. NACHA rules further provide (subsection 2.5.2 of Article Two of the 2006 Operating Rules) that when an ODFI submits a reversing entry it must indemnify the ACH Operator and the RDFI.

The word "request" was employed in the preceding paragraph intentionally. NACHA guidelines make it clear that the seller's bank is not required to return an ACH credit when requested to do so by an ODFI (Paragraph D of Section III, Chp. 5 of the 2006 Operating Guidelines). In addition, the RDFI is given the explicit right under NACHA guidelines to require a written letter of indemnification from the buyer's bank prior to returning an ACH entry.

The NACHA rules and guidelines impose two other key requirements upon a buyer who is seeking to reverse an ACH credit entry to its seller.

First, NACHA rules require the buyer to notify the seller that it is reversing the original payment no later than the settlement date of the reversing entry. The NACHA rules do not prescribe the method by which the buyer must notify the seller, but the important point to remember is that the seller must have at least some prior notice (if only same day) that the buyer is planning to reverse the ACH payment.

The obvious implication of this is that if a seller has not received prior notice of a reversal from the buyer, the seller can rightly claim that NACHA rules were violated and the recall invalid.

Presumably, if prior notice is received, a seller can take such actions as it deems appropriate in order to protect its interests.

Second, every reversing entry must be transmitted to the buyer's bank no later than midnight of the fifth banking day following settlement of the original entry. Sellers therefore can take some comfort in knowing that five banking days after payment from the buyer is received, the buyer is precluded under NACHA rules from recalling the payment through the ACH system.

Final thoughts

It would appear then, as if the rules regarding the reversals of wire transfers and ACH credits are quite similar. In both instances, the buyer has to base its reversal request on an allegation that the seller was not entitled to the funds in some way and the seller's bank is under no obligation to actually agree to the reversal request.

However, it was stated at the start of this article that there was more risk of a reversal occurring with an ACH credit than with a wire transfer. If the rules are very similar, how can this be the case?

The answer lies in the differences between the two payment methods.

Each wire transfer is a unique and standalone transaction. As each wire is processed individually, banks assume that they are accurate and correct and reversal requests are immediately flagged and questioned.

ACH entries are batched together in files often containing thousands of individual entries. In addition, many ACH entries are smaller dollar transactions of a reoccurring nature. For example, when consumers arrange their monthly power, gas and cable bills to be automatically debited from their accounts each month, those payments are made via ACH, not via wire.

With literally thousands and thousands of entries packed into an ACH file, banks (rightly or wrongly) don't assume anything is unusual if a mistake in an individual ACH entry is claimed.

The practical effect of this assumption is that financial institutions will routinely process ACH reversal entries without paying any special attention to them. Unfortunately, this puts sellers and their counsel at greater risk if they choose to settle their sale transaction via ACH than if they choose to do so by wire.

Michael Dickey has been a vice president & counsel for Citizens Bank since 2000. In addition to advising Citizens' personnel on commercial lending issues, his responsibilities include supporting the Global Markets and Cash Management Units, which entails providing advice on international and domestic funds transfers. Admitted to the Massachusetts bar in 1993, he is a graduate of the Dalhousie University School of Law and earned a Masters in Banking Law from Boston University's Morin Center. He can be e-mailed at michael.dickey@citizensbank.com.

Reducing the 'risk of reversal': wire transfers and ACH credits

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same bank, the bank will affect the payment order by means of a "book entry" essentially adjusting its internal books and records to reflect the debit to the buyer's account and corresponding credit to the seller's account.

If the buyer and seller do not share the same bank, the buyer's bank will have to communicate the payment order to the seller's bank. The three primary networks over which payment orders are transmitted are: Fedwire, Clearing House Interbank Payment System (CHIPS) and the Society for Worldwide International Financial Telecommunications (SWIFT).

In some instances, especially in more complex transactions such as international transactions, a payment order might make short stops at one or more intermediary banks for further processing along its way from the buyer's bank to the seller's bank.

A wire transfer can be viewed as a chain which consists of discrete links. It might help to imagine a line of people with the buyer at the head, passing a dollar bill to the second person in line. That person in turn passes the dollar to the person behind him. This series of exchanges continues until the dollar is passed from the second to last person in line into the hands of the seller.

The law terms the entire chain of interconnected exchanges a "funds transfer" and treats each exchange in the chain as a separate payment order.

Each party to a funds transfer has very clear and distinct rights and obligations. These various rights and obligations are laid out in detail in Article 4A of the Uniform Commercial Code. It is the provisions of Article 4A, then, that one must consult in order to determine under what circumstances a buyer can cancel and recall a wire.

The person or entity who receives funds in exchange for goods or real estate in a purchase and sale transaction is commonly called the seller. Article 4A calls the seller, or perhaps more accurately, the person or entity that ends up with funds in their account at the completion of a funds transfer, the "beneficiary." Article 4A terms the seller's bank the "beneficiary's bank" and the buyer and other banks in the fund transfer chain as either a "sender" or "receiving bank."

The ability of a sender to recall a wire hinges primarily on whether or not the payment order has been accepted by the receiving bank.

The general rule under 4A is that a cancellation order is effective as long as it is received at a time and in a manner that affords a receiving bank a reasonable opportunity to act on the cancellation order before the receiving bank accepts the order. Put another way, as long as the seller's bank hasn't accepted the payment order, chances are good that the buyer can reverse the wire.

However, after acceptance by the seller's bank occurs, the scales tip in favor of the seller; cancellation orders are generally ineffective.

The key time for a seller, therefore, is the point in time at which its bank accepts the payment order.

The rules regarding acceptance of a payment order are explained in §4A-209, which sets out a couple of different events that will trigger acceptance of a payment order. As far as a seller is concerned, by far the most important trigger is set out in §4A-209(b)(1), which basically states that the beneficiary's bank accepts a payment order when it pays the beneficiary or notifies the beneficiary that its account has been credited.

Therefore, once a seller or seller's counsel learns or is notified by its bank that funds have been credited to their account, the seller can safely assume that the payment order has been accepted and that therefore, the funds cannot be recalled.

This comfort level is based on the text of §4A-211(c), which reads in part: "After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees."

What this language essentially means is that once a beneficiary's account has been credited (i.e. the beneficiary's bank has accepted the payment order), there is no legal obligation upon the seller's bank to act upon requests received from the buyer's bank to recall or reverse the wire. One should note that the term employed in §4A-211(c) is "receiving bank" not "beneficiary's bank," which means that all receiving banks (including, obviously, receiving banks which are also beneficiary banks) which have accepted a payment order have the right to refuse to reverse a wire.

For beneficiary banks specifically, §4A-211 goes even further to add additional restrictions on reversals of wires.

Section 4A-211(c)(2) states that cancellation of a payment order after acceptance by the beneficiary's bank is only available in instances where the payment was unauthorized or there was a mistake by the sender and that mistake falls into one of three categories: duplicate payment, payment to a person or entity not entitled to the funds, or payment which resulted in the beneficiary receiving more that they were entitled to.

The effect of this language is to take issues such as buyer's remorse completely off the table and legally limit the instances where a buyer can even attempt to recall funds already credited to the seller's account to only those instances where the buyer can make a claim that the seller received funds to which it was not entitled.

In summary, the general rule is that once a seller's account has been credited, the buyer is effectively limited to claiming that the seller was not entitled to some or all of the funds if the buyers wants to recall the wire, and even then, the seller's bank is fully protected by Article 4A if it elects to ignore the buyer's recall request.

At this point, the discussion has to shift from the rules set out in Article 4A to how the application of these rules plays out in practice.

Banks are ill-suited to adjudicating disputes between different parties; they recognize this fact, and seek to avoid acting as judge and jury in disputes involving their customers. Whether or not a bank's customer is or is not entitled to the funds that were just credited to their account is exactly, therefore, the type of dispute a bank will seek to avoid becoming involved in.

With Article 4A protecting them if they choose to ignore a buyer's recall request, absent a court order or clear and convincing evidence that a mistake or fraud has occurred, most banks' default position will be to refuse to agree to reverse the payment order absent the permission of their customer.

What this means for the seller and seller's counsel is that once funds coming in via wire hit their account, it is almost a certainty that they will not be pulled back out without their permission.

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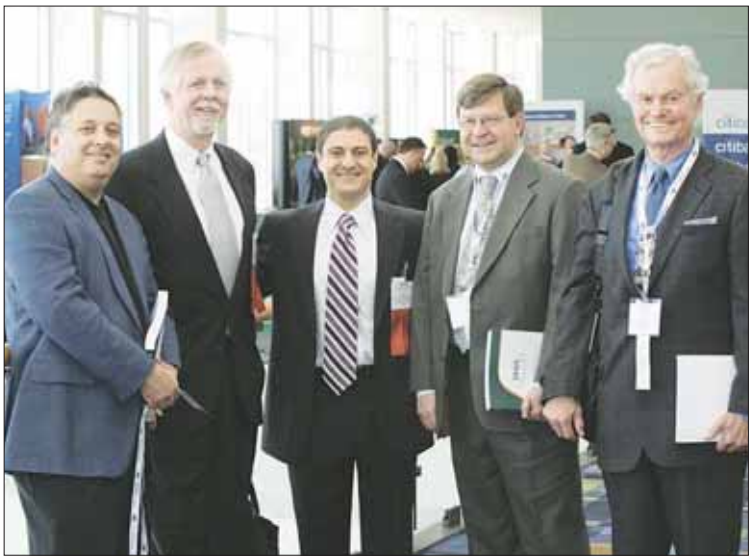
Spring Conference 2007

More scenes from REBA's

in pictures



REBA Spring Conference 2007

OPINION

The 'discouraging' effect of developers bearing gifts

By Paul F. Alphen

Those of us who regularly practice in the area of real estate development have come to expect that municipal land-use boards will attempt to extract a quid pro quo in exchange for the permits and approvals that they are bound, statutorily, to issue.

With the exception of certain communities, it has become an accepted practice for cities and towns to expect applicants to deliver "gifts" to the city or town in exchange for approvals.

While the Legislators on Beacon Hill and the Governor ponder ways to encourage businesses to stay in the commonwealth, local officials continue to discourage new growth and development and torment developers.

How did this happen?

It all started with the adoption of the Subdivision Control Law and the provisions within G.L.c. 41, §81Q that allow planning boards to adopt rules and regulations. The statute says that the rules and regulations shall not require that land be dedicated to public use without just compensation. The statute also says that the rules and regulations shall not establish standards for new roads that exceed the standard commonly applied by the town to the construction of publicly financed roads.

Well, there is caselaw that says that we should not pay too much attention to those statutory provisions. We have all seen subdivision roads that look like airport runways. It seems as if in the '60s and '70s planning boards decided that if it became too expensive to construct subdivision roads, that development would be discouraged.

Planning boards adopted requirements for extremely wide roadways with expensive granite curbs and other features, including sewer and water pipes that connect to nothing. The requirements did not discourage development; they only made home ownership more expensive.

Undaunted, planning boards made the rules and regulations more complicated and continued with efforts to discourage new construction, but the overall strategy failed. Ultimately, planning boards learned that the development community would find money to meet the ever-increasing requirements of the boards.

The term "mitigation" was stolen from the jargon of the Boston development community. Some speculate that there was a seminar at one point where town planners shared the notion that the development community would donate mitigation fees or public works projects under certain circumstances. Those certain circumstances seem to be that developers would agree to provide mitigation as a quid pro quo to obtaining their permits if the cost of the mitigation was less than the cost of legal fees and delays, which would accrue if it became necessary to appeal a decision. Savvy planning boards calculated where the financial breakpoint would be and began routinely requesting mitigation.

At first, the mitigation was modest and somehow linked to the proposed development. For example, if a retail store was proposed for a busy intersection, the applicant would donate remote control traffic signal control equipment for use by the police and fire departments.

Throughout the 1990s, with each success, the planning boards got more ingenious in the depth and breadth of their mitigation requests. We all know of projects that were required to donate fire trucks, police cars, off-site sidewalks, ball fields, traffic studies and cash to a town in exchange for an approval.

One practitioner tells the story of how he protested to a town planner that incorporating the requiring of off-site improvements within the conditions of approval was unlawful. The practitioner explained to the planner that such donations were strictly voluntary and should be considered by the planning board as a gift from a cooperative applicant.

The planner took the advice to heart and rather than eliminating the need for mitigation in that particular town, for the last 10 years the condition of approval incorporating the quid pro quo reads: "The Planning Board gratefully accepts the voluntary gift of the applicant, to be provided prior to obtaining a building permit, in the form of a [insert gift here]."

The practice of seeking and accepting gifts is not universal. In one Metro-West, suburban town, the planning board refuses to accept gifts from developers, but in a nearby town the police cars are plastered with the advertisements of donors.

If you combine the cost of the gifts with the extraordinary time required to run the permitting gauntlet and the unpredictability of the final outcome, you would have to agree that Massachusetts is a difficult place within which to do business.

A colleague recently relayed to me the story of meeting with a town planner to informally introduce a new G.L.c. 40B comprehensive-permit project that would significantly address the town's severely deficient affordable housing needs. The town planner immediately responded by stating that he would expect over $1 million dollars in mitigation, and this was before he saw a single plan of the proposal. The practitioner made initial inquiries with state law enforcement agencies to determine where the line may be drawn between a bribe and justified mitigation, but was unable to receive any guidance.

In the landmark case of *Durand and others v. IDC Bellingham, LLC & others*, 440 Mass 45, 79 NE 2nd 359 (2003), the Supreme Judicial Court determined that the promise of an $8 million gift to a town in exchange for favorable rezoning by town meeting was not unlawful contract zoning or a bribe.

In essence, the court ruled that it is impossible to bribe a legislative body. That is not to say that towns are authorized to expect and demand gifts in exchange for permits and approvals.

The leading case of *Sullivan v. Planning Board of Acton*, 38 Mass. App. Ct. 918, 645 NE 2nd 703 (1995), stands for the proposition that local land-use boards cannot impose conditions upon applicants, the performance of which lies entirely beyond the applicant's power.

The case specifically applied to work within a state highway and the court noted that the Commonwealth of Massachusetts has exclusive authority to regulate the state highway; and local land-use boards cannot impose conditions upon an applicant to perform improvements within the state highway.

The principles established in that case have been cited on many occasions, including the Land Court case of *Kindercare Learning Centers, Inc. v. Cadigan, et al.*, 10 LCR 190 (2002). In that case, the Land Court found that a condition imposing the construction of an off-site sidewalk was invalid for two reasons: "First, the zoning by-law does not provide for the imposition of such a requirement" and "the second reason is that a requirement of off-site improvements is counter to case law," citing *Gutierrez v. Town of Framingham*, 4 LCR 102 (1996), and the *Sullivan* case.

One of the fundamental aspects of land-use regulation is that applicants should know in advance what requirements will apply to their proposal. This fundamental principle allows landowners, developers and their lenders an opportunity to evaluate intelligently the development potential of the project.

Because the imposition of mitigation (or gifts) by municipal boards is frequently outside the scope of their statutory authority, and because the mathematics used to calculate the expected value of such gifts appears to be arbitrary, it is impossible to predict the costs and obligations that will be imposed upon any new development. This, in turn, discourages development and/or makes it very expensive to do business in the commonwealth.

Perhaps it is an exaggeration to suggest that the gift-giving required of developers harms the Massachusetts economy, but if you combine the cost of the gifts with the extraordinary time required to run the permitting gauntlet and the unpredictability of the final outcome, you would have to agree that Massachusetts is a difficult place within which to do business.

A partner in the Westford firm of Balas, Alphen & Santos, Paul F. Alphen serves as treasurer of REBA. He concentrates in commercial and residential real estate development and land- use regulation, practice before municipal boards, real estate transactional practice and title examination. He was a founder and the first chair of the association's Land Use and Zoning Committee. As entertaining as he finds the practice of law, he enjoys numerous hobbies, including messing around with power boats and cars and joining his family and friends at BC football games. He can be e-mailed at paul@lawbas.com.

OPINION

After the subprime 'meltdown': reform or regulation?

Editor's Note: The recent meltdown in the subprime lending market and the increase in residential loan defaults and foreclosures both in Massachusetts and nationwide has spawned a variety of legislative responses. Bills focusing on disclosure in the loan origination process, more local regulation of lenders, particularly in the subprime market, and proposed revisions to G.L.c. 244, which governs Massachusetts foreclosure practice, have been filed. The following is a REBA News Opinion offered by Board member Jon S. Davis, whose practice includes a significant concentration in default and foreclosure work.

By Jon S. Davis

Before we propose any changes to G.L.c. 244 and Massachusetts foreclosure practice, let us be certain that there is, in fact, a clear and defined problem that would be remedied by a Massachusetts court issuing pre-conditional judgments before a lender can begin a foreclosure action.

The perceived problem, as articulated by Secretary of State William Galvin and other proponents of the legislation, is that there is no forum within which a borrower can challenge a foreclosure in Massachusetts.

As a general proposition, adding a judicial process to what now exists here seems to have little practical benefit to borrowers, since judicial remedies in the Superior Court already exist. See *Beaton v. Land Court*, 367 Mass. 385 (1975); *Albano v. North Adams Hoosac Sav. Bank*, 361 Mass. 892 (1972).

To require the Land Court to issue a pre-conditional judgment before commencing a foreclosure action could be a major burden for the court given the existing budget-available staff. The new permitting session and the mandate to the court to sit in locations outside of Boston have added administrative and other responsibilities for court staff. I doubt that putting these cases in the District, Superior or Housing courts, as has also been suggested, would at all be viable.

Currently, Massachusetts is one of many states with a prescribed and deliberate but non-judicial process for real estate mortgage foreclosure. Proposed legislation filed by Galvin and others requiring the involvement of a court process may be a reflexive political response without substantive evidence of a systemic problem.

In all but 1 percent or 2 percent of foreclosure cases, the borrower is well aware that a default exists. In those few cases of doubt, the lender provides the borrower with a detailed and verifiable payment history.

Risk-adverse lenders do not like to foreclose. Typically, the lender offers a borrower the option of a workout program, but many borrowers simply cannot qualify for a workout. A lender will not accede to a loan work-out accommodation program unless the lender believes that the borrower will succeed.

From the first missed mortgage payment, a Massachusetts residential foreclosure takes about seven months. Typically, the case is not forwarded to lender's counsel with instructions to foreclose, until the loan is at least three months in arrears.

The foreclosure process itself, including pre-foreclosure compliance with the federal Servicemembers Civil Relief Act, takes another four months. An increase in this timeline will add costs for the lender and the borrower.

No lender is perfect and mistakes are, of course, made. However, lenders and their lawyers must respond to complaints by borrowers.

No lender wants the inevitable bad publicity; a G.L.c. 93A claim for an unfair and deceptive trade practice; intervention by the banking commissioner's office; an action for injunctive relief; or a potential class action. A lender gains nothing by ignoring the claims or concerns of a borrower in a loan default.

Proposed legislation to further regulate the mortgage foreclosure process in Massachusetts must be subjected to careful cost/benefit analysis. Bills currently before the Legislature will add significant burdens to the judicial system, and to both borrowers and lenders, with little likelihood of preventing or reducing mortgage foreclosures.

Instead of further complicating the mechanics and extending the time frames of foreclosure practice, attention should be focused on regulating the lending industry, particularly the players in the subprime market.

Many subprime loans should never have been made. The mortgage market and the stock market have now recognized and reacted to this. A number of subprime lenders have gone out of business or filed for bankruptcy. And Wall Street investment houses have pulled back on investing and securitizing these loans. FHLMC and the FNMA have announced that they will no longer acquire these mortgages.

There is certainly a need for reform — not necessarily in foreclosure practice, but in the origination process, to eliminate mortgage fraud and predatory lending.

As long as residential mortgage brokers are paid a commission on a per-loan basis instead of a salary, there will be abuses in the origination process. Home buyers must be educated that the mortgage broker does not necessarily act in the best interest of a borrower.

A real solution will be a legislative focus on the mortgage origination process, not foreclosure practice.

A longtime member of the association, Jon S. Davis practices in Marshfield. He chairs REBA's Committee on the Practice of Law by Non-Lawyers. He can be e-mailed at jonsdavis@stantondavis.com.

REBA files legislation to combat notary abuses

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borrower has retained a personal attorney, he or she does not have the opportunity to seek independent answers to important questions about the mortgage loan documents.

The absence of a qualified independent attorney at the closing, even one hired by the lender, too often means that the loan documents are not adequately explained to the borrower.

In appropriate cases a qualified independent attorney would be obliged to explain the significance of a particular recorded easement or discharge a recorded lien, for example — issues that may not concern a lender, but which have important consequences for the homeowner.

Standards and enforcement

Since notaries public are gubernatorial appointments, the administration of Gov. Mitt Romney was concerned with the absence of explicit standards of conduct, and of explicit executive prerogative in the event of serious misconduct by a notary.

In 2003, and in revised form in 2004, that administration promulgated Final Revised Executive Order 455 (04-04). The arrival of a new administration on Beacon Hill has prompted a discussion of whether or not the revised executive order continues to have the force of law. Most believe that it does.

Still, where there is some doubt, REBA has proposed legislation, Senate Bill No. 877 and House Bill No. 1642, sponsored by the Joint Committee on the Judiciary Co-chairmen Sen. Robert S. Creedon Jr. and Rep. Eugene L. O'Flaherty, which in substance would codify in statute the revised executive order.

A similar bill, which also particularly targets abuses in immigration matters and provides remedies for enforcement, has been filed as Senate Bill No. 1033, by Sen. Susan C. Tucker.

The enforcement measures, of course, could not be accomplished by executive order, and thus would require legislation. REBA recommends that the three bills be consolidated into a single measure and passed.

Among the provisions and statutory clarifications, the measure should:

- specify as misconduct by a notary public, and provides penalties for: (a) performance of any act prohibited, or failure to perform any act mandated, by the legislation, or by any other law, in connection with a notarial act; (b) a material misstatement or omission of fact in an application to be a notary; (c) conviction of a felony or any of certain misdemeanors;
- specify the governor's authority to remove or decline to reappoint a notary;
- empower enforcement by the state attorney general, including by injunction;
- establish a private right of action;
- specify the manner in which a proposed signatory is to provide satisfactory evidence of identity;
- provide that a notary public shall not refuse to perform a notarial act solely based on the principal's race, advanced age, gender, sexual orientation, religion, national origin, health, disability, or status as a non-client or non-customer of the notary public or the notary public's employer;
- clarify prohibition on non-attorney notaries conducting real estate closings and otherwise offering to provide legal advice and representation;
- require notaries to maintain a journal of all notarial acts, unless a notary is an attorney or is employed by an attorney;
- allow non-Massachusetts residents to be notaries if they conduct business in Massachusetts;
- specifically make the same requirements apply to the conduct of justices of the peace when taking acknowledgements or administering oaths and affirmations;
- prescribe forms but permits notaries to use forms that comply with court rules, statutes, or laws of other states; and
- state that non-compliance does not have any impact on the recordability or validity of the underlying document.

Litigation update: suit against NREIS advances in federal court

By Lawrence R. Kulig

REBA commenced a lawsuit against National Real Estate Services in Suffolk Superior Court in November 2006. NREIS transferred the case to the U.S. District Court where it has been assigned to Judge Joseph L. Tauro.

Gael Mahony, Lawrence Kulig and Ben McGovern of Holland & Knight represent the Association. NREIS is represented by the firm of Kirkpatrick & Lockhart, Preston, Gates, Ellis.

REBA's complaint alleges that NREIS is engaged in the unauthorized practice of law in violation of G.L.c. 221, §46A, which provides that "no individual, other than a member, in good standing, of the bar of this commonwealth shall practice law."

The complaint alleges that NREIS is performing all components of conveyancing, including reviewing title to real estate to determine the status of ownership and any encumbrances thereon; preparing legal documents to convey an interest in the property (including deeds, affidavits, mortgages, etc.); conducting settlements and closings, recording deeds and mortgages which convey a legal interest in the property; and disbursing funds at or after the closing.

Further, the complaint contends that NREIS, to give the appearance of complying with Massachusetts law, retains attorneys only to witness the execution of documents at the closing; but otherwise, the attorneys perform no other substantive task, nor do they have a direct relationship with the mortgage lender.

As relief, REBA is seeking declarations from the court that NREIS is engaged in the unauthorized practice of law and its use of attorneys to conduct "notary closings" violates G.L.c. 221, §46A, and an attorney engaged to convey an interest in real estate must have a direct attorney-client relationship with the lender, and not be subject to NREIS control.

REBA also seeks an injunction that NREIS be permanently enjoined from such unlawful conduct.

In its response, NREIS has argued that the services it provides do not constitute the practice of law. In addition, NREIS asserts in a counterclaim that the application of G.L.c. 221, §46A to it and the centralized settlement services it provides for mortgage loan transactions involving property in Massachusetts would violate the Commerce Clause of the U. S. Constitution.

Article I, Section 8, Clause 3 of the U.S. Constitution provides that Congress has the power to "regulate commerce … among the several states."

NREIS notes that the Commerce Clause limits the power of states to take action that affects interstate commerce. From that premise, NREIS maintains that, while Congress has not enacted legislation concerning settlement providers, nonetheless, settlement providers are sheltered from state law requirements that conveyancing be conducted by members of the bar in good standing.

REBA's position is that state laws defining the authorized practice of law do not violate the Commerce Clause.

Pursuant to the federal rules of civil procedure, prior to engaging in discovery, the parties (through counsel) are required to confer and reach agreement on a schedule for conducting discovery, motions and trial or other dis-

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Lawrence Kulig, together with Gael Mahony and Ben McGovern, serve as special UPL counsel to REBA in connection with the NREIS litigation. Kulig has practiced civil litigation for over 20 years. Prior to joining Holland & Knight, he was a partner with Goldstein & Manello in Boston. Kulig is a graduate of Lafayette College and Villanova University School of Law. He can be e-mailed at lawrence.kulig@hklaw.com.

‘Paperless’ registry in Lowell offers quality, efficiency

By Richard P. Howe Jr.

Will paper soon join the quill pen and the typewriter in obsolescence when it comes to the operation of the registry of deeds? Recent developments certainly make it seem so.

In Lowell, the migration away from paper began back in November 1994 with the acquisition of the registry’s first scanner. The few thousand pages of digital images that were captured that year have now grown to nearly 10 million.

With just a handful of exceptions, all documents recorded since 1855 are now freely available on the registry website, www.lowelldeeds.com.

All pre-1855 documents have already been digitized and will soon join their companions on the Internet.

The same is true for our pre-1976 grantor and grantee indexes. Rather than embark on the hugely expensive task of recreating those indexes on our existing computer system, we have simply scanned our index books, creating a digital image of each page. I envision presenting these electronically exactly as they were presented in paper form — in an alphabetized book that allows the user to peruse prior and following entries in the book.

The paperless registry concept applies to the recording process as well.

With electronic recording, the registry never even sees a paper document. Instead, the customer transmits an image of the original document plus associated data to the registry via a secure internet connection.

This electronic package arrives at our recording terminals with an announcement that an electronic recording is ready to be processed. We open the package, review it for accuracy and, if all is in order, record it — both the data and the document image — with a single click on the computer screen.

Recording fees and documentary stamps are paid by bank transfer from the customer to the registry, so checks, cash and the need to deposit them become a thing of the past.

All pre-1855 documents have already been digitized and will soon join their companions on the Internet.

Since the beginning of the electronic recording “pilot” program in June 2005, up until the end of May 2007, we have recorded a total of 5,611 documents electronically with 53 percent of them being discharges, 24 percent mortgages, 22 percent assignments and 1 percent “other.”

Technologically and operationally, we are prepared to receive an unlimited amount of electronic recordings.

However much electronic recording grows, no one expects 100 percent of our recordings to be submitted that way. But recordings done the traditional way — by physically bringing a paper document to the registry — have in a sense become “paperless” as well.

The method of recording and scanning tangible documents had changed little since the first scanner arrived back in 1994.

Documents would enter the registry at the recording counter where preliminary index data would be captured, cashiering would occur and recording information would be assigned. The customer would depart with a receipt and the hope that the original document would be returned by mail weeks or months in the future. The retained document would maneuver its way through the scanning and verification departments with its final stop in the mailroom for the last leg of its journey back to the customer.

This year, we have transitioned from

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A frequent and welcome contributor to REBA News, Dick Howe is register at the Middlesex North District Registry of Deeds. He can be e-mailed at richard.howe@sec.state.ma.us. To access Dick’s blog, log on to www.lowelldeeds.com.

REBA member remarks on 'Moot'

Editor's Note: In response to the SJC's decision in Moot v. Department of Environmental Protection, 448 Mass 340 (2007), Gov. Deval L. Patrick filed House Bill 3757 to mitigate the unexpected consequences of the Moot decision. REBA also supports the legislation. In May, attorney Michael Marsh, an association member, wrote a letter to Senate President Therese Murray and House Speaker Salvatore F. DiMasi, discussing some of the technical title issues involved with filled tidelands in general and the Moot decision in particular. The following is the text of that letter:

Dear President Murray and Speaker DiMasi:

I am writing to describe our position on the effect of the decision of the Supreme Judicial Court in *Moot v. Department of Environmental Protection,* 448 Mass. 340 (2007) on title insurance certifications and title insurance policies with respect to properties on "landlocked tidelands."

For the reasons described below, including full disclosure to the Legislature and to our clients, and to avoid possible claims against our firm, we now feel compelled to take exceptions on title certifications and title policies for property which is landlocked tidelands and property that we cannot determine to our satisfaction (based on separate surveyor's certifications) was entirely ancient upland. These title exceptions will reference M.G.L. c.91 and related public rights. Attached for your reference is a statement of my qualifications and the qualifications of this law firm on this subject.

According to testimony from the Department of Environmental Protection on April 5, 2007 to the Joint Committee on Environment, Natural Resources and Agriculture, approximately 3,000 acres of modern Boston and Cambridge alone are landlocked tidelands. As defined in the DEP regulations, 310 CMR 9.00, landlocked tidelands are filled, former tidelands, located landward of interconnecting public ways existing on January 1, 1984, more than 250 feet from the current waterfront, and not in designated port areas.

By definition, then, landlocked tidelands were once subject to the ebb and flow of the tide. As such, they were either formerly land beneath the ocean, owned and controlled by the Crown as a public highway, which rights passed to the United States or the commonwealth after the Revolution, or they were formerly located between the low and high tide lines, in which case, after the 1640s (when Massachusetts "privatized" the intertidal zone) they were private land, subject to the reserved public rights of fishing, fowling and navigation. These public rights are by their nature matters of title; effectively reserved public easements in the case of the rights of fishing, fowling and navigation on private, inter-tidal land.

Since 1990, on the strength of the clear licensing exemption for existing fill on, and existing *and future* uses and structures on landlocked tidelands in the DEP regulations, this office has not taken exception for M.G.L. c.91, or such public rights, in title certifications, title commitments and title policies concerning real estate located in whole or in part on landlocked tidelands.

In *Moot* however, the regulatory exemption from licensing was invalidated. Subsequently, we understand that the court stayed the effectiveness of its decision for a 180-day period (which we calculate to end in early September). Notwithstanding that the court-ordered stay effectively leaves the DEP regulations in place for 180 days, after consultation with the title insurers whom we represent, at this time we are now taking exceptions for c.91 and such public rights in title certifications or title policies regarding landlocked tidelands. We are concerned that the Legislature may not act to authorize the pre-existing DEP regulations before the end of the stay.

We understand that some legislators have proposed that any curative legislation might authorize the DEP regulatory exemption only for properties which had achieved certain regulatory milestones, for example a certificate of occupancy. Implementation of the milestones would require knowledge of matters that are not

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Environmental hazards a concern in real estate management

By Stephen A. Sakakeeny

The life-sciences industry has enjoyed tremendous growth in Massachusetts over the past two decades. Biotechnology, pharmaceutical, medical device and healthcare facilities occupy millions of square feet of Massachusetts real estate.

Ironically, as these companies discover technologies and manufacture products that improve our health, there may be a health risk from what they leave behind in the buildings in which they operate.

Unlike heavy manufacturing, which makes infrequent changes in real estate, life-science companies move through real estate almost on a whim. And the real estate they occupy is versatile, so that it can later become offices, dormitories, condominiums or daycare centers.

So what's the concern? The concern is the environmental risk that a life-science operation leaves behind. This includes contaminated building surfaces and polluted ventilation systems that could pose a health risk to unsuspecting building owners and subsequent tenants who breathe the air, and to construction workers who unknowingly remove building materials containing hazardous residue.

This is not to infer that the condition of a building's indoor health from a life-science operation approaches that of mold. But the problem of mold in buildings the past 10 years has set the stage for concern for all potential indoor health risks in real estate.

Real or perceived, the risk viewed by today's real estate stakeholders is not waiting for a mold-like manifestation. Building owners and managers are increasingly aware of these risks and are managing such concerns through lease terms. Prospective buyers of former life-sciences facilities have added the health of the building's interior to their environmental due diligence. Life-science companies recognize this liability and are managing it by performing environmental closures of their facilities when moving out.

Life-science operations are "light," and include research labs, bench top analytical equipment and laboratory hoods. Hundreds of solvents, acids, bases, infectious substances and other hazardous substances are used and operations generate hazardous waste, infectious waste or both. For those facilities that perform prototype to full scale product manufacturing, the number of chemicals and waste involved may be fewer, but the volume of material handled is much greater.

Environmental closure essentially makes sure that no containers of hazardous materials are left behind, building surfaces and equipment left behind are clean, environmental permits are terminated, and all work is well documented.

There are five main aspects to a proper closure, including review and inventory of materials and equipment to be managed; disposal of hazardous materials, equipment and furnishing that are not reused elsewhere; decontamination of equipment, furnishings and building systems not disposed; environmental testing of building surfaces and air quality, if necessary; and documentation of work.

Decontamination should include all areas subject to handling and storage of hazardous materials and wastes. This includes laboratories, hoods, chemical storage areas and loading docks if hazardous materials are staged there. Decontamination is generally not expensive and therefore should be comprehensive. A wipe down of surfaces with a dilute solution of detergent and disinfectant is generally sufficient.

Areas subject to infectious materials

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Stephen Sakakeeny is a licensed site professional and president of SAK Environmental in North Andover. He manages environmental matters associated with real estate for owners, developers and industry across New England. He can be e-mailed at ssakakeeny@SAKenvironmental.com. Log on to www.SAKenvironmental.com.

GAO grades title insurance industry

By Joel A. Stein

As previously reported in REBA News in a Jan. 24, 2006 letter, House Financial Services Committee Chairman Michael Oxley requested that the Government Accountability Office investigate the title insurance industry to determine the level of competition existing in the industry.

The report was instigated in part by the investigation of affiliated business operations and reinsurance operations by insurance commissioners in several western states, including Texas, Colorado and California.

In a report entitled "Actions Needed To Improve Oversight of the Title Industry and Better Protect Consumers," the GAO has examined the characteristics of title insurance markets and differences across states; factors determining prices and competition in the industry; and the current regulatory environment and planned regulatory changes. (Complete copies of the GAO report are available at www.gao.gov and www.alta.com.)

The study reviewed the laws, regulations and market prices in California, Colorado, Illinois, Iowa, New York and Texas. These states were chosen on the basis of the differences in "the size of their markets, title insurance practices and customs, the rate-setting and regulatory environments and the number of federal and state investigative actions."

The study notes that although five insurers account for 92 percent of the national market, state markets differ in other ways; these differences include the extent of affiliated business arrangements, differences in how title agents carry out searches, the way title insurance is marketed, and the extent of agent's activities.

The study further notes that purchasing title insurance is generally a "small part of a larger home purchase or mortgage refinancing process that most consumers do not want to disrupt or delay for relatively small potential savings." Consumers generally do not select their agent or insurer.

Concern for the consumer was, of course, the immediate impetus for the report. The GAO specifically notes "given consumer's weak position in the title insurance market, regulatory efforts to ensure reasonable prices and deter illegal marketing activities are critical."

The GAO report emphasizes that consumers have a weak position in the title insurance market, in part because title agents do not market to them, but to real estate and mortgage professionals who make the decision as to which title insurance company to utilize.

A conflict of interest may arise if those making the referrals have a financial interest in the agent. Recent legal activities targeted by HUD and state insurance regulators raise the issue as to whether consumers are overpaying for title insurance as a result of such activities.

The study notes that as property values and loan amounts increase, prices that consumers pay for title insurance appear to increase faster than an insurer or agent's costs. In states where the agent's search and examination services are not included in the premium, it is not clear if the underlying costs justify the additional amounts consumers may pay to title agents. Data collection efforts of title agents were limited across the states reviewed by the study.

The critical question of whether amounts paid by consumers for title insurance reflect the actual underlying cost of producing title insurance policies was not clear, and the study concludes that potentially understanding the relationship between costs and the amounts consumers pay can help regulators improve their ability to protect consumers.

State regulators rarely audit agents and have done little to oversee affiliated businesses, possibly because title insurance is a relatively small line of insurance.

The study recommends that HUD take several actions to improve the functioning of the title insurance market.

These actions include expanding the

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Joel A. Stein is a former president of the association and is the recipient of REBA's highest honor, the Richard B. Johnson Award. He practices in Braintree and can be e-mailed at jastein@friedmanstein.com.

REBA
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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.

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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

Last February, President-elect Tom Bussone proposed a creative initiative which would provide a new source of significant non-dues revenue for REBA.

Having served as treasurer last year, Tom knew that REBA would face significant financial pressure from our recently-launched lawsuits against non-lawyer notaries public and National Real Estate Information Services, an out-of-state, non-lawyer closing services provider. REBA brought these lawsuits to enforce the Massachusetts unauthorized practice of law statute and case law.

A member-dues increase or special assessment is always challenging, particularly when so many of our members are sole practitioners or practice in small law firms. With that perspective, a steady stream of revenue, independent of membership dues, to fund one of our core missions, would be very attractive.

We have learned since our victory in the *Colonial Title and Escrow* (2001) decision that the national settlement service companies will do everything they can to work around the law in Massachusetts. We are in this battle for the long-term, and we cannot afford to lose.

Tom's idea would permit REBA to tap into the Massachusetts title insurance market — an approximately $272 million market in 2006. He proposed an affinity program with one of the title insurance underwriters doing business in Massachusetts. When a REBA member issues a title insurance policy under the affinity program, a portion of the underwriter's share of the premium would pass to REBA.

It appears that the underwriter best-suited for such an affinity relationship is Connecticut Attorneys Title Insurance Company. CATIC is the only title insurance underwriter exclusively using lawyers as its agents in Massachusetts and throughout New England. While the local offices of all the other underwriters support their attorney agents and REBA, their national offices permit non-attorney agents to conduct closings and issue title insurance policies on Massachusetts real estate. This subverts our Massachusetts unauthorized practice of law statute.

This proposed affinity relationship with CATIC is what we have been commonly referring to as "REBA Title." My description of the concept, which is still evolving, is very general. The proposal was presented to REBA's Board of Directors in April, and the Board voted to authorize the officers to perform a due diligence investigation of the REBA Title concept. That due diligence is underway as I write this update.

Nevertheless, REBA Title has sparked an intense reaction from some of our members, particularly those in the title insurance area. Understandably, the other title insurance underwriters are vehemently opposed to REBA Title. In their view, REBA Title would bestow an unfair advantage to one of their competitors. Some have vowed to take any action necessary to protect their market share here in Massachusetts. At REBA's 2007 Spring Conference in May, employees of some of the other title insurers made a political statement by wearing "Stop REBA Title" buttons.

On May 14, I wrote to the entire membership describing the REBA Title proposal and inviting their thoughts and comments. To my amazement I received a multitude of responses within minutes. I am delighted by the interest and engagement of our members on this issue. Regrettably, the replies are too many for me to answer on an individual basis.

However, these responses have revealed several common misconceptions which need discussion and clarification.

First, the term "REBA Title" could be misleading. REBA Title will not perform title examinations or conduct closings. REBA Title will perform many of the same services offered by any title insurance underwriter here in Massachusetts. Such services could include recruiting title insurance agents who will become CATIC agents, distributing forms and supplies, collecting policies and premiums from agents, offering training and continuing legal education to agents, and assisting with underwriting and resolution of title claims.

Second, REBA members would certainly not be required to participate in the program. As with our other REBA affinity programs, participation will be purely voluntary. Those who elect to participate would not, of course, be expected to compromise or suspend their existing business relationships with the other underwriters.

Lastly, participation in REBA Title will not affect a lawyer-agent's share of the policy premium. REBA Title would be compensated solely by CATIC for its services.

Predictably, these responses reveal that some members support and others oppose REBA Title. However, the member responses, regardless of their position, shared some common themes.

Our members overwhelmingly support REBA's ongoing efforts to combat the practice of law by non-lawyers. Moreover, they recognize the association's financial needs with respect to the current federal court litigation against NREIS. Many members even suggested that they would pay a dues increase or a special assessment to support the battle.

Members are concerned about the adverse effect REBA Title might have on our existing relationships with the other underwriters. To raise needed resources for REBA's litigation initiatives, many members suggested seeking continuing support from all the title insurance companies. And we have reached out to the other underwriters for their suggestions and support.

We are encouraged that our members' concerns are the very same concerns raised by our Board members. These concerns are now being deliberated in detail by REBA's officers. I expect the due diligence to be completed shortly, and the board will vote on whether to proceed with REBA Title. It is clear to me that the board's decision will not be based purely on financial considerations — if it were, the decision would be easy.

We are proud of our association's unique 150-year history of collegiality. As president, I will always encourage members to offer new ideas and to freely express their views. Our Board and officers need your support during this challenging time.

Founder of Baghdady Law Offices with locations in Arlington and Worcester, Sami 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 contacted at sami@baghdadylaw.com.

REBA files legislation to combat notary abuses

By Edward J. Smith

REBA's leadership in identifying and resisting the practice of law by non-lawyers in Massachusetts is well known. Through litigation and legislation REBA has opposed the well known efforts of settlement services and national trade associations to change the law and create a market for national lenders that seek to control all aspects of mortgage closings in the commonwealth.

REBA's position has been that the home mortgage closing represents the largest financial transaction for most consumers, and that decisions made by home buyers and other mortgage borrowers are particularly susceptible of improper influence, and even predatory behavior, by individuals who are unqualified to give legal advice and have a financial stake in the transaction.

Ed 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.

Another service provider that has come under scrutiny in mortgage closings is the notary public.

The practice of "witness-only closings" — or "notary closings" — which has existed in a number of other states, has appeared in Massachusetts, increasing the risk that mortgage closings will fail to comply with various consumer protections.

The Commissioner of Banks has shut down certain mortgage lenders and brokers, but often after the damage has been done.

Further, there have been a growing number of complaints of abuses in the conduct of certain notaries, notably in their dealings with members of the state's non-English speaking communities.

In Latino and other immigrant communities notaries have been found to represent or advertise themselves as being qualified to provide legal advice and assistance in immigration and other legal matters, when in fact they are not attorneys, nor are they supervised by attorneys.

Certain notaries public have been known to represent that they have special influence with the U.S. Citizenship and Immigration Services, and for a fee will submit completed immigration forms on a client's behalf.

Mortgage closings

The origination and closing of real estate mortgage loans has resulted in widespread abuses, particularly for lower-income borrowers with so-called high-cost loans, many in the subprime market.

The parallel phenomenon of inadequately capitalized mortgage lenders has led some buyers, sellers and borrowers to discover, even after the closing, that a mortgage lender is unable to provide good funds to finance the transaction.

The Commissioner of Banks has shut down certain mortgage lenders and brokers, but often after the damage has been done.

The practice of notary closings makes it difficult to determine whether a mortgage lender has complied with the good funds law, G.L.c. 183, §63B, which requires that, prior to the recording of the mortgage, the full amount of the loan proceeds shall be transferred to either the borrower, the borrower's attorney or the lender's attorney, in the form of a certified check, bank treasurer's check, cashier's check or wired funds that cannot be reversed.

Typically in a notary closing the mortgage funds do not get transferred to either the borrower or to any attorney's escrow account. As a result, there is no confirmation that good funds were actually made available for the transaction, either to pay off the previous mortgage or, as the case may be, to provide a seller his sale proceeds.

Further, in a notary closing, unless the

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REBA
THE REAL ESTATE BAR ASSOCIATION *for Massachusetts*

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$ ___ Voluntary contribution to support REBA initiatives in combating the practice of law by non-lawyers.

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