REBA NEWS

Summer 2008

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The Newsletter of the

Real Estate Bar Association for Massachusetts

Lapatin receives Richard B. Johnson award

Phil Lapatin received the association's highest honor, the Richard B. Johnson Award, in recognition and gratitude of his 30 years of service to REBA and its predecessor, the Massachusetts Conveyancers Association.

Lapatin, a partner in the Boston office of Holland & Knight and a virtuosic public speaker, has produced a 60-minute program on recent case law developments for the association's twice-yearly meetings. The award was presented by Rudolph Kass, a retired justice of the Massachusetts Appeals Court.

The new Homestead Statute: highlights of the new law

By Michael J. Goldberg and Erica P. Bigelow

In a joint effort with the Boston and Massachusetts bar associations, REBA has submitted the Homestead Bill to the Legislature that, if enacted, will effect sweeping changes to the current Massachusetts Homestead Statute, G.L.c.188, §1 et seq. Currently under consideration by the Massachusetts Legislature as S.2653, the Homestead Bill will modernize the statute to reflect the changing circumstances of families in the commonwealth. The Homestead Bill also addresses many of the issues that have arisen in recent Bankruptcy Court cases, where bankruptcy judges have endeavored to apply an outdated and ambiguously-worded statute. These reforms should create more consistent and predictable results for both debtors and their creditors, and reduce the amount of litigation over the extent of homestead protection while maintaining the vitality of this important consumer protection.

GOLDBERG

BIGELOW

As members of REBA's Homestead Subcommittee responsible for drafting this bill, we believe that several of its provisions are quite important, and will substantially change practice in this area of the law. The most significant changes are highlighted below.

1. Automatic homestead. In perhaps the most important addition to current homestead law, the Homestead Bill provides that all families owning a home as their primary residence will have a homestead exemption of up to $125,000 without filing a declaration of homestead. (Homeowners who wish to avail themselves of a larger exemption amount may still file a declaration of homestead, in which case the amount of the homestead exemption increases to $500,000.) As those who represent financially troubled individuals can attest, there are nu-

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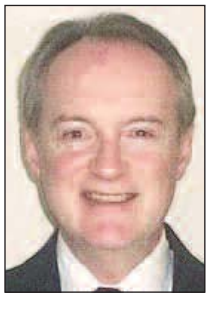
Legislation in brief



By Edward J. Smith

When the 185th General Court of the Commonwealth dissolves in January 2009, among their accomplishments will be measures to improve or promote education, health care, child welfare, job opportunities, business development, and transportation and other infrastructure improvements. REBA's legislative agenda, while modest in comparison with these and other ambitious goals of policymakers, has always been to improve conveyancing practice and promote consumer benefit through legislation affecting real property.

REBA is pleased to report progress on our own initiatives, including passage of St. 2008, c. 13, which amended G.L.c. 183A, §9, to dispense with the requirement to append a copy of the unit floor plans to each first unit deed out in a condominium. Chapter 13, applicable to unit deeds both past and future, eliminates the need to record a confirmatory instrument to comply with a requirement that had little practical benefit, since a full set of plans is always part of the master deed.

More ambitious REBA measures have also made progress.

An omnibus revision of the Massachusetts homestead statute, G.L.c. 188, has been the most labor-intensive legislative project for REBA since the mortgage discharge omnibus act of 2006. Working with the Boston Bar Association and the Massachusetts Bar Association, REBA is proud of the bill recommended by the Joint Committee on the Judiciary, chaired by Sen. Robert S. Creedon Jr. and Rep. Eugene O'Flaherty, since it will provide solutions to issues that have confounded and disappointed practitioners and judges for many years. We look forward to success in the Senate and House when S. 2653 comes before them for votes this summer.

A measure to codify and enforce professional standards applicable to notaries public, seeks

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What's in this issue…

A Supplement to Massachusetts Lawyers Weekly

REBA to launch Young Leaders group

By Joseph P. McBride

With nearly 3,000 members and growing, REBA is now the bar association of choice among transactional practitioners in Massachusetts and surrounding states. Despite this growth, REBA has always lacked a significant membership presence from law students and newly-admitted members of the bar. To this end, REBA has created a new group to be part of the next generation of REBA members: the Young Leaders.

According to our research, nearly 1,400 law students have expressed interest in a transactional practice in Massachusetts alone. This is an enormous pool from which to recruit the future leaders of the association. Events will be focused around networking job placement and continuing education. We hope to garner interest in REBA's commitment to preserving the integrity, professionalism and excellence of the practice of law in this state at the onset of these new attorneys' careers. This will ensure a strong base of enthusiastic and energetic members of REBA to continue our 150-year tradition.

The inaugural event will be held at a downtown law office and will be led by a panel of distinguished REBA members to discuss the role these new members will have in the association. All Young Leaders will enjoy two complimentary years of membership with REBA.

This fall, REBA representatives will be traveling to and speaking with students and law school groups in order to generate interest in this new initiative. Additionally, REBA will reach out to newly-admitted bar members to serve as members of this group.

Before we can officially launch this program, we need your help. As leading experts in real estate law, we know that you are well connected. We would appreciate your assistance in securing introductions to law school faculty at area universities so that we can share our plans and determine the best opportunities for a possible partnership.

The program will be overseen by Member Services Administrator Joseph McBride, who can be contacted regarding any questions or comments pertaining to Young Leaders. He can be reached at (617) 854-7555 or at mcbride@reba.net.

Joe McBride is Member Services administrator at REBA. His email address is mcbride@reba.net

REBA
THE REAL ESTATE BAR ASSOCIATION *for Massachusetts*

Membership Application for 2008

_____ New Membership _____ Renewal of Current Membership
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50 Congress Street, Suite 600
Boston, Massachusetts 02109-4075
Tel: (617) 854-7555
(800) 496-6799
Fax: (617) 854-7570

Mission Statement

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

Mentoring Statement

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

From the President's desk

By Paul F. Alphen

Many of us who attended the REBA Spring Conference and heard Jeff Fuhrer's poem, available on our web site, have often since repeated the closing line:

When you put nothing down on your home mortgage loan;

That's renting, my friends, with an option to own.

Those of us old enough to have practiced during the savings and loan crisis of the late 80s and early 90s appreciate the many similarities between the S&L crisis and today's mortgage and credit crisis. We remain skeptical of the ability of both lenders and regulators to prevent another repeat of those very problems.

The current president of REBA, Paul Alphen is a partner in the Westford firm of Balas, Alphen & Santos, where he concentrates in residential and commercial real estate development and land use regulation, administrative law, real estate transactional practice and title examination. He is active in the Westford community, and has served on numerous town committees and is currently the chair of the town's Highway Garage Building Committee. He can be reached by e-mail at Paul@lawbas.com.

As closing lawyers, we want to believe that the loan underwriting process was rigorously and properly completed, that the requirements and standards of the secondary mortgage market were fulfilled, and that the lender has delivered to us a qualified borrower and a properly structured transaction. In most cases we are confident that the lender has performed its due diligence.

However, we must ask ourselves, as individual practitioners and as a bar association: Can we do more to insure the overall integrity of the entire process?

One proposal, recently advanced by HUD, includes the reading aloud to the borrowers of a "closing script" at the closing table. You can read REBA's response to this HUD proposal, authored by Joel Stein, on our website, www.reba.net. Notwithstanding that most of us have developed our own "script" to explain closing documents, Joel points out that "If the script brings the borrower to the realization that the loan offered is unaffordable or will not meet the borrower's financial needs, the options for the borrower at that point may lead to substantial financial hardship. A borrower who fails to complete the transaction may forfeit the deposit in the case of a sale or lose the interest rate in the case of a refinance."

The borrower must fully understand the financial ramifications of the transaction before reaching to the closing table. We lawyers can do our best to educate borrowers on the legal significance of the note, the mortgage and the numerous other closings documents, but how can we determine if the borrower possesses the underlying financial resources to meet the loan's long-term obligations? This question will consume much energy and discussion during the coming year. We have already heard from many thoughtful REBA members, raising hypothetical questions about what they should do if they are performing a closing and something "doesn't feel right" about the borrower's ability to repay. There are, of course, far too many variables for one easy answer here, but it is worthy of further discussion and study.

All this ultimately means is that the practice of law, like the law itself, is ever-changing. Not only must we keep up with developments in the law, but we must also stay current with developments in the practice of law. While the practice of law continually evolves through technological advances and other outside influences, we cannot let the practice of law be altered by external commercial forces that would put expediency ahead of consumer protection, our professional standards, and the integrity of our underlying financial system.

What does this have to do with you? Everything!

You have the opportunity, and the obligation, to participate in discussions that will shape how real estate and transactional law is practiced in the near and distant future in Massachusetts.

You can participate in REBA committees and subcommittees, joining in discussions with your colleagues regarding the challenges that we all face on a day-to-day basis.

You are not alone in your concerns and thoughts. You can enroll in committee List-Serve services and share your concerns on-line.

You can also continue to attend our twice-yearly all-day conferences.

And you can become active in your local real estate bar association.

While it is a daunting proposition to defend yourself from such external forces, you will take great comfort that you have so many colleagues who believe, like you, that the practice of law is a serious and honorable calling.

A colleague recently told me that he practices law employing the principals of "Kaizen," a Japanese philosophy that focuses on self-examination and continuous improvement throughout all aspects of life. We cannot rest on our laurels; we must constantly seek ways to improve and refine our conduct and our practice. REBA can be a resource for your continuous improvement.

The 2008 ALTA expanded coverage policies

By Jonathan S.R. Anderson

Part 2 in a series

The American Land Title Association has approved two new expanded coverage title insurance policy forms: the Homeowner's Policy of Title Insurance for a One-to-Four Family Residence (expanded coverage owner policy), and the Expanded Coverage Residential Loan Policy. The policies bear a revision date of January 1, 2008.

The first article in the series described the covered risks in the new Homeowner's Policy, and compared the new policy with both the existing Homeowner's Policy, which was last revised in 2003; and the new Standard Owner Policy, which was revised in 2006. This article will examine other provisions in the new Homeowner's Policy that impose limitations or conditions on coverage.

The 2008 Homeowner's Policy Coverage Statement

The Coverage Statement in the new Homeowner's Policy is similar to the 2003 policy form, with a new notice admonishing the insured to notify the title insurer in writing as soon as the insured knows of anything that might be covered by the policy. The Coverage Statement clearly states that the policy covers only land that is a residential lot improved with a one- to four-family residence. Each named insured must be a Natural Person (a defined term). The policy mainly covers actual loss described in the Covered Risks when the event creating the risk exists on the Policy Date (effective date of the policy). Since some of the Covered Risks provide coverage against loss resulting from events occurring after the Policy Date, there is also "post-policy" coverage.

The Coverage Statement summarizes the provisions that limit the insurance, including: (1) Policy Amount; (2) Exclusions; (3) Conditions; (4) Deductible Amounts and Maximum Dollar Limits of Liability for Covered Risks shown in Schedule A; (5) Exceptions listed in Schedule B; and (6) certain limitations on the insurer's duty to defend referred to in the section of the policy titled "Our Duty to Defend Against Legal Actions." That particular section states that the insurer's duty to defend the title applies only to legal action which is based on a Covered Risk, and which is not otherwise excepted or excluded from coverage. The section also states that the title insurer can end its defense obligation under Section 4 of the Conditions. This article will examine the Conditions in more detail later.

Exclusions

There is no insurance against loss, costs, attorneys' fees or expenses resulting from any matters that comprise the Exclusions. Because much of the coverage provided by the Homeowner's Policy includes insurance against loss resulting from matters traditionally excluded in the Standard Owner's Policy, many of the Exclusions in the Homeowner's Policy contain carve-out language stating that the particular Exclusion does not limit the coverage described in certain enumerated Covered Risks.

Many of the Exclusions are similar to those in both the 2006 Standard Owner Policy and the 2003 Homeowner's Policy. One difference between the new and the existing Homeowner's Policy is that the new policy removes the exceptions to the Exclusions and, like the 2006 Standard Owner Policy form, transfers

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Jon Anderson is a senior title counsel with CATIC and has been with CATIC for more than 20 years. He is a member of the Forms Committee of the American Land Title Association (ALTA), and the Real Property Section and a former chair of the Affordable Housing and Homelessness Committee of the Connecticut Bar Association. Jon can be emailed at janderson@caticaccess.com.

Don't get left holding the bag: attorney exposure in the subprime meltdown

By Robert A. McCall

We are undoubtedly in the midst of a once-in-a-lifetime crisis, in the current residential mortgage meltdown. The mass media relentlessly pound upon the mismanagement and misconduct of mortgage lenders and mortgage brokers. Mostly, the media have rightfully focused on the woe of unsophisticated homeowners who were manipulated into high risk adjustable rate subprime mortgages. Lost in the scuffle, however, are the attorneys who may be left holding the bag in some circumstances.

Robert McCall is a litigation and bankruptcy partner with the law firm of Peabody & Arnold LLP, Boston. He frequently represents professionals, insurers, debt collectors and lenders in disputes with debtors. Bob can be emailed at rmccall@peabodyarnold.com.

The attorneys frequently close mortgages at a heavily discounted fixed fee, have minimal contact with the lender and meet the borrower only at the closing. Yet a number of scenarios present significant risk to closing attorneys. One such scenario currently facing attorneys involves class action litigation brought by borrowers against subprime lenders.

What are these class actions?

According to studies by Navigant Consulting, class action lawsuits on behalf of consumers against mortgage lenders have exploded since 2007. During 2007 and the first quarter of 2008, nearly two hundred such actions have been filed. Most of the litigation focuses upon a litany of claims against mortgage companies for predatory lending practices. The complaints assert that the lenders violated federal and state disclosure requirements and also seek rescission and damages. In addition, the complaints contain common law claims such as fraud and breach of contract along with statutory claims under consumer protection statutes such as Chapter 93A.

One notable example is Ameriquest Mortgage Company, which has been a defendant in such class actions for a number of years. In the case of Ameriquest, the federal Panel on Multi-District Litigation has consolidated all of the federal cases and assigned those cases to a single judge in the Northern District of Illinois, where the litigation is now pending. The media have widely reported that these lenders have their own financial problems. Ameriquest is essentially defunct as a lender, American Home Mortgage is in bankruptcy, and Countrywide appears to be surviving at the mercy of Bank of America. As a result, the lenders and the plaintiffs have an incentive to bring to the party folks who may have money: attorneys with professional liability coverage.

How are attorneys involved in these class actions?

Third-party claims by lenders which are asserted against attorneys tend to arise from the closing of a loan for a member of the plaintiff class. The crux of lenders' third-party claims is that the closing attorneys failed to follow any and all federal and state laws or regulations relating to required disclosures in connection with mortgage loans including, but not limited to, notice of a right to cancel. In actuality, the lenders may readily admit that closing counsel did properly close the loans at issue and the appropriate documentation is usually in the files of both the lender and closing counsel.

What are the defenses for attorneys?

Any attorney who is brought into an MDL class action should first consider whether there is any personal jurisdiction. The fact that a claim is brought in

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Bette J. Roth joins REBA Dispute Resolution

Bette J. Roth, full-time mediator and arbitrator, has joined the panel of mediators/neutrals of REBA Dispute Resolution, a subsidiary of the Real Estate Bar Association.

"We are delighted that Bette has joined our growing program," said REBA/DR President Judge Mel Greenberg. "Her considerable experience as a full-time mediator and arbitrator will be a great asset to REBA Dispute Resolution."

"REBA/DR is not just for real estate any more," said REBA Executive Director Peter Wittenborg. "Bette will bring greater depth to our panel and offer more options for our dispute resolution clients."

Roth is a mediator and arbitrator, and teaches mediation at Boston University School of Law. Before focusing her practice exclusively on dispute resolution in 1992, Ms. Roth was a trial lawyer for many years, working with the Securities and Exchange Commission, and Brobeck, Phleger & Harrison in San Francisco.

Roth has mediated or arbitrated more than 750 cases involving a wide range of real estate, commercial, employment, securities, construction, professional malpractice and family business disputes. She is a panelist with the American Arbitration Association (mediation and arbitration), FINRA (mediation), and Case Closed. During the years 2001–2008, she was also the executive director of the Middlesex Multi-Door Courthouse in Cambridge.

Recognized for her work in dispute resolution in 2006 and 2007, Ms. Roth was named a "Super Lawyer" in the field of ADR by Boston Magazine and Law & Politics Magazine. In 2001, she received the John Dunlop Dispute Resolution Award from the Commonwealth of Massachusetts.

Roth has spoken extensively on mediation and arbitration for the Boston Bar Association, where she currently co-chairs of the Litigation Section's ADR Committee, the ALI-ABA, and the Massachusetts Continuing Legal Education, where she has also trained arbitrators. She has published numerous articles on mediation and arbitration through Massachusetts Lawyers Weekly, the Boston Bar Journal, The Practical Lawyer, PIABA, NSCP Currents, MCLE, CCLE, and on antitrust through The Antitrust Bulletin.

Roth is the primary editor and author of the national two-volume text, "The Alternative Dispute Resolution Practice Guide" (copyright © 1993-2008 Thomson/West), a finalist for the 1994 CPR book award. This text is widely cited by litigants and judges and has become a staple in most law libraries. In publishing the updates for this text each year, Ms. Roth has remained on the forefront of ADR developments for the past 15 years.

A graduate of the University of Massachusetts, Amherst, cum laude, and

the University of Wisconsin Law School in Madison, Ms. Roth received mediation training from Randy Wulff in San Francisco and Framingham Court Mediation Services. She was trained to arbitrate by the American Arbitration Association in San Francisco and Boston.

How the Housing Bubble Stole Household Well-Being

(An abbreviated epic poem, with apologies to T. Geisel)*

By Jeff Fuhrer

Every home down in Homeville liked spending a lot;

But their wallets, which held quite few dollars, could NOT.

Still they spent through the year, summer, spring and fall seasons.

Now, please don't ask why. No one quite knows the reasons.

It could be they longed for that plasma who-dinger
It could be they needed that turbo-Z-zinger.

But I think the most likely reason of all
May have been they believed their house price couldn't fall.

For they'd borrowed, you see, from the worth of their homes,
Using mortgages wrought by Zurich-ian gnomes.

Now that seemed a fine method to pay for their spending
And it helped swell the coffers of those who were lending.

So while house prices swooped up and soared like a jet
All the homes down in Homeville got loaded with debt.

And the rest, as they say down in Homeville, is history.
The source of the problem was really no mystery:

When you put nothing down on your home-mortgage loan
That's called renting, my friends, with an option to own.

*a.k.a. Dr. Seuss

The venerable Abstract Club celebrates 125th anniversary

By Ruth A. Dillingham

The Abstract Club celebrated its 125th anniversary at a dinner on May 29 at the Union Club in Boston. Eighty members of the club, both honorary and regular, were in attendance. The evening began with a reception and was followed by a sit-down dinner with period menu in the Oak Room, the site of most club meetings in the past years.

The current president of the Abstract Club, Ruth Dillingham is also special counsel and lender liaison for the First American Title Insurance Company. She is an alumnus of Mount Holyoke College and Boston University School of Law and a past president of the Real Estate Bar Association. Her e-mail address is rdillingham@firstam.com.

Among the attendees were President Ruth Dillingham, Secretary/Treasurer F. Sydney Smithers, Executive Committee member E. Christopher Kehoe, and past presidents, Executive Committee members, and officers including Diane Tillotson, Edward Bloom, Robert Hoffman, Henry Thayer, Martin Loria, Herbert (Wiley) Vaughan, Gordon Piper, Mason Taber, and David Ries. Current and former members of the judiciary included Rudolf Kass, Peter Kilborn, Gordon Piper, and Charles Trombly.

The meeting began with a welcome to the guests, including an extension of thanks to member Peter Wittenborg for providing the club with REBA resources.

Ruth Dillingham then delivered brief remarks, commenting on the status of the club since its history was last chronicled by Mark Titlebaum in 1985. Ruth's remarks follow:

"I was drawn to Mark's comments as he made some observations and projections that I would like to share with you tonight (remembering that some 20 years have passed), and I would like to provide some current context.

"Mark noted that the club had recently expanded its membership from 75 to 100 and projected that it would remain at that number—as it has—which of course led to the much-enjoyed 2005 article in Lawyers Weekly entitled 'Dying To Get In,' in which then-club president Marty Loria totally spilled the beans about the club (noting 'this is the most publicity we've ever received'). Mark also noted an increase in women members; one hopes he would look favorably upon the success women members have had, not only at the bar, but also in the governance of the club (the past two presidents have been women). He points to the club's 'good health' and the continued success of the semiannual cocktail party. We have indeed maintained that well.

"As for the purpose of the club, he predicted continued participation in matters of the public arena, both in legislative and litigation strategies. While our legislative input has not been great of late, certainly our Amicus Committee, under the loving care of Henry Thayer, has done a tremendous job of monitoring cases of concern.

"As for our meetings, Mark predicted an increase in discussions about land use, the environment and financial instruments. If we include leases in that last category, he was dead on! As for his thought that strict title matters would concern just a few, I beg to differ just a bit, as I personally most enjoy those discussions, and I predict our foreclosure process will be the topic of discussion for a few meetings to come.

"Finally, he looked for the club to continue to keep members abreast of changes and to remain a means by which competitors can meet as friends. On that point we can all agree.

"In closing—and I would be remiss not to note that at the time of his final remarks 'Sex and the City' would not be

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a New York Observer column for another eight years—Mark says: 'As the current neo- Puritanism runs its course, martinis will once again be the preferred drink at meetings.'

"We shall see ..."

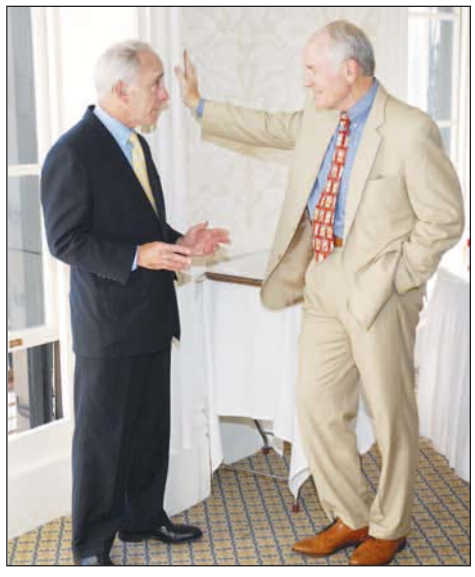
At that point the meeting was turned over to Syd Smithers, who introduced a very special speaker: Chief Justice of the Supreme Judicial Court Margaret Marshall, who coincidentally had been attending a meeting of the American Bar Association in the same building. She noted the presence of a group of "dirt lawyers" and agreed to join us for a few remarks. She very graciously spoke of the importance of the club, its commitment to the practice and its ongoing status as a mentoring institution for attorneys to come. She also noted the club's presence as a participant in the court's deliberations through the submission of amicus briefs. She commented that the briefs from the Abstract Club were appreciated, both for their contributions to the law and for their brevity, with a special appreciation to Henry Thayer's contributions to both.

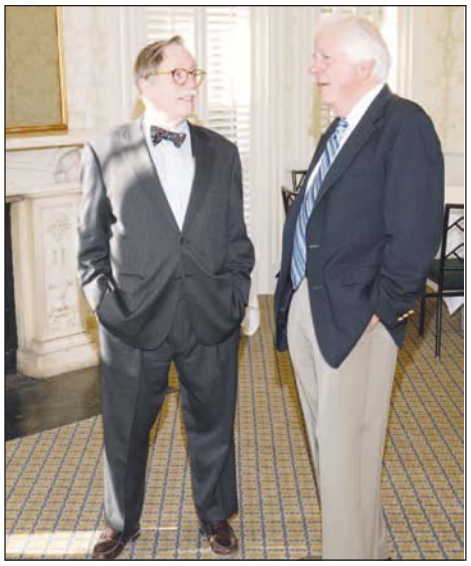
Upon the conclusion of her remarks, there was a brief business meeting followed by a performance of a medley of songs created for the event and performed by members of the club. Song topics included private ways, standing in land use litigation, a tribute to prior members, adverse possession and club meetings. At the end of the meal, there was a light-hearted challenge of memory and trivia with a game of Abstract Club Jeopardy.

The meeting provided an opportunity for members who had not attended in a while to meet up with old friends, and for many who had attended more recently to meet some of the most respected members of the conveyancing field. All agreed it had been delightful, and are looking forward to another gala in 25 years!

Celebrating 125 years of the Abstract Club

The Abstract Club celebrated its 125th Anniversary, with a reception and dinner at the Union Club. The festivities included a look back at the club's past and a nod to the possible future, with speeches and songs from current members and special guests.





REBA Spring Conference

The new Homestead Statute: highlights of the new law

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merous Massachusetts residents who, being unaware of the protections available under the Homestead Statute, simply fail to file the necessary declaration in time to protect the equity in their homes. Consistent with the purpose of the Homestead Statute—to provide financially strapped debtors with some assurance that they will be able to protect their homes from collection efforts of creditors—the new automatic provision will give the consumers a baseline of protection in the event of a financial crisis. The level of protection is also consistent with the "cap" on homesteads set forth in the Section 522(p) of the Bankruptcy Code.

The automatic homestead also provides an important "backstop" for homeowners who file a declaration of homestead: if for any reason a filed homestead declaration is found to be invalid, the homeowner nonetheless will have the benefit of the automatic exemption.

2. Declaration of homestead. The Homestead Bill revamps the mechanics governing the declaration of homestead. In particular, the drafting group concluded that the requirement that a single spouse sign the declaration is confusing and counterintuitive, as all other title documents require the signature of both spouses. Moreover, the choice of which spouse should sign is often unclear. Thus, under Section 2 of the Homestead Bill (governing requirements applicable to homestead declarations generally), co-owning married persons residing together must both sign the homestead declaration. However, where the co-owning spouses reside separately at the time the declaration is made (for example, if they have separated in anticipation of divorce), only the signature of the resident spouse is required.

Additionally, in the homestead declaration, the declarant(s) will be required to specify his/her/their marital status. Where only one spouse is in title, the declarant spouse will be required to identify the non-titled spouse entitled to the protections of the homestead. The purpose of these changes is to ensure that, in families that choose to have only one spouse in title, the protections afforded the non-titled spouse are nonetheless preserved – and most importantly, that they cannot be released without the consent of the identified non-titled spouse.

3. Trusts. The Homestead Bill provides protection to beneficiaries of trusts holding title to the residence, provided that the home is, in fact, the beneficiaries' principal residence. This is a significant change to current law: currently, trust beneficiaries do not enjoy homestead rights. See *Assistant Recorder of No. Registry District of Bristol Cty. v. Spinelli*, 38 Mass. App. Ct. 655 (1995). Consequently, in order to obtain homestead protection, the resident beneficiaries must cause title to be transferred to them individually in order to file a valid homestead. However, such a transfer, if made within 1,215 days of a bankruptcy filing, would result in the homestead amount being limited to $136,875. 11 U.S.C. §522(p). Making trust beneficiaries eligible for homestead protection will eliminate this trap.

4. Effect of second homestead declaration on same residence. The Homestead Bill provides that a second homestead declaration filed with respect to the same primary residence will relate back to the initial declaration, for purposes of determining priority over involuntary liens filed between the filing of the two declarations. (See Section 2, fifth paragraph.) This treatment of multiple homesteads will avoid the harsh result that sometimes occurs as a result of the existing rule, that a later-filed homestead terminates the prior homestead declaration. See *In re Garran*, 338 F.3d 1 (1st Cir. 2003); *In re Leigh*, 307 B.R. 324 (Bankr. D. Mass. 2004). The relation-back rule would also apply where holders of homesteads under Section 1 subsequently file a declaration under Section 1A (the homestead provision for persons 62 and older and the disabled), and vice versa.

5. Proceeds protection. Under the current homestead statute, there is no express protection for proceeds derived from the sale of a home, or insurance proceeds received on account of damage or destruction to the home, and substantial uncertainty as to whether such protection can be judicially derived. See *U.S. v. Hyde*, 497 F.3d 103, 106-07 (1st Cir. 2007); *In re Wiesner*, 267 B.R. 32 (Bankr. D. Mass. 2001). Thus, homeowners who have sold their property but not yet reinvested the proceeds in a new home, or who have sustained a casualty loss but not yet expended insurance proceeds on repair expenses, face the loss of those proceeds to attaching creditors. The drafting group believed that the absence of protection in such situations defeats one of the principal policy rationales for the homestead exemption. Thus, Section 8 of the Homestead Bill provides protection for the proceeds derived from sale, taking, or damage by fire or other casualty, for a reasonable, although not unlimited, period of time.

Under proposed Section 8, the proceeds of sale or taking are protected for a period to end on the earlier to occur of (i) the date upon which a homestead may be declared in another home, or (ii) 12 months after the sale of the original homestead. In the case of fire or other casualty, the period runs until the earliest of (a) re-occupancy, (b) date upon which a homestead may be acquired in another home, or (c) two years after the date of the fire or other casualty.

6. Termination of the homestead. Two recent bankruptcy decisions, *In re Melber*, 315 B.R. 181 (Bankr. D. Mass. 2004) and *In re Hildebrandt*, 320 B.R. 40 (1st Cir. B.A.P. 2005), brought to light an issue created by the language of Section 7 of the

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A member of the Massachusetts, New York and New Jersey bars, Michael Goldberg is a frequent lecturer on bankruptcy topics, particularly on the impact of bankruptcy issues on real estate transactions. Since 2004, he has co-chaired the "Bankruptcy Law Forum," the flagship bankruptcy program of Massachusetts Continuing Legal Education. He has also chaired MCLE's "Bankruptcy for Real Estate Lawyers" program and is a contributor to the treatise Chapter 11 Theory and Practice: A Guide to Reorganization. His e-mail address is goldberg@cwg11.com.

Erica P. Bigelow is a Counsel at Rich May PC, where she concentrates on real estate and business law, and a member of REBA's Legislative Committee. Her transactional practice includes representation of both lenders and developers/owners. Ms. Bigelow is a graduate of Radcliffe College (cum laude and Phi Beta Kappa) and Harvard Law School (cum laude), and she was assistant editor for the first edition of Massachusetts Foreclosures (MCLE). She has written and lectured on zoning, affordable housing (Chapter 40B) and smart growth. Her e-mail address is ebigelow@richmaylaw.com.

The new Homestead Statute: highlights of the new law

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current Homestead Statute, dealing with the termination of homestead declarations. Under the existing statute, a deed of property that failed to reserve the homestead terminates the homestead declaration. However, as highlighted in the *Melber* and *Hildebrandt* decisions, when spouses or co-owners engage in transfers between themselves, they can unwittingly terminate a homestead by failing to include a reservation of homestead rights. Under the Homestead Bill, a deed by all owners and their spouses that does not reserve the homestead will still terminate the homestead. At the same time, Section 7 of the Homestead Bill provides that "[n]o deed between spouses or former spouses or co-owners who singly or jointly hold an estate of homestead under section one or three . . . shall be deemed to terminate said homestead unless each co-owner or spouse entitled to the benefit of the homestead has executed an express release thereof . . ." This language should prevent the recurrence of the situations encountered by the courts in *Melber* and *Hildebrandt*, and protect spouses and other co-owners from inadvertent terminations of their homestead rights as a result of transfers among themselves.

7. Automatic subordination of the homestead to mortgages; protection of declarant(s) against homestead termination provisions in mortgages. There has been significant uncertainty of late over the effect of a mortgage (typically, a refinancing mortgage) on a previously-filed homestead. A number of decisions have now addressed whether, under Massachusetts law, a mortgage is the equivalent of a "deed" terminating the homestead under Section 7, see *In re Heretakis*, 293 B.R. 82 (Bankr. D. Mass. 2003), and have held that the mortgage does not terminate the homestead. However, the cases have not yet addressed the enforceability and effect of an express waiver of the homestead contained in the mortgage – language which is found in many standard home mortgages. Filling this gap, Section 6 provides that any language in a mortgage purporting to terminate a homestead is to be construed to effect a subordination, not a termination, of the homestead. Equally importantly, Section 6 of the Homestead Bill prohibits mortgage lenders from requiring a release of homestead in connection with the making and recording of any mortgage. The Homestead Bill will thus protect homeowners who execute a standard-form mortgage from involuntary termination of their homestead.

As can be seen, the Homestead Bill, if enacted, will substantially modernize the homestead protections available to residents of the Commonwealth, making this important consumer protection available to a broader base of Massachusetts homeowners. Just as significantly, it will help clarify many of the provisions of the statute that have caused great difficulty to courts interpreting its terms, and lead to more consistent and rational results for both debtors and creditors. With the full support of REBA, the BBA and the MBA, it is hoped that, by this time next year, the Homestead Bill will have become the law of the commonwealth—it is certainly a bill whose time is long past due.

Legislation in brief

Continued from page 1

to respond to a growing number of complaints of abuses by certain notaries, notably in real estate and other transactions. REBA is pleased with the bill recommended by the Joint Committee on the Judiciary, S. 2652, which has also been endorsed by the MBA and the Office of Attorney General Martha Coakley. We look forward to success in the Senate and House when the measure comes before them for votes this summer.

Once again defeated was the legislation that would allow non-lawyer settlement companies to perform real estate closings, both residential and commercial, in the Commonwealth (H 1551).

A number of measures proposed by others have also received the attention of REBA's Legislation Committee, ably chaired by E. Christopher Kehoe and Edward A. Rainen.

A proposal from the Department of Revenue to require closing attorneys to withhold capital gains tax estimates from seller proceeds, has been approved by the House and Senate—in somewhat different versions of the FY 2009 general appropriations bill. REBA has been working to defeat and /or modify these provisions.

Gov. Deval L. Patrick and Secretary of State William F. Galvin have proposed legislation to affect the manner in which recording fees for mortgage discharges and assignments, in so-called multi-reference instruments, will be calculated at registries of deeds. REBA's primary goal is to insure predictability and uniformity, in this and other ways, at the 21 registry districts. This proposal was approved in the Senate version of the FY 2009 general appropriations bill, in §§ 14D and 54H of S. 2714.

REBA supported the successful extension of the dedicated technology money from the 2003 special $5 surcharge on recordings at the Registries of Deeds. REBA supported continuation through June 2011 of this revenue stream, recommending that free web-based access to land records be expanded to all 21 registries. Web access to recorded instruments and documents is a matter of convenience to REBA members, but never an adequate substitute for a title search. Chapter 20 of the Acts of 2007 was approved by the governor March 7, 2007.

Some cities and towns are seeking a limitation on a municipality's liability for unpaid condo fees following tax takings. H. 2990 would reverse the holding of the Supreme Judicial Court in *Boyd v. Town of Milford*. Opposed by REBA, the bill has been recommended by committee and is before the House Committee on Bills in Third Reading.

Finally, two new measures have recently been recommended by REBA's Legislation Committee:

(a) to simplify the execution requirements for mortgage foreclosure instruments under M.G.L. c. 183, § 54B, and

(b) to simplify the form of the notice publication in mortgage foreclosures, thereby to reduce publication costs.

Edward J. Smith is in private practice in Boston, representing individuals, businesses and nonprofits in real estate transactions and related litigation. He has been legislative counsel for the Real Estate Bar Association for Massachusetts and the Massachusetts Academy of Trial Attorneys. He served as general counsel for the Massachusetts Bar Association from 1980-1985 and prior to that, as counsel to the Joint Committee on the Judiciary of the Massachusetts Legislature. He has been a panelist for Massachusetts Continuing Legal Education and is a regular contributor to the Real Estate Bar Association's newsletter, REBA NEWS. He earned a B.A. in Political Science at Northeastern University and received his J.D. from Suffolk Law School. His email address is edwardjsmith@verizon.net.

Auctioneer Hall of Fame Inducts Stanley J. Paine as Youngest Member

Entrepreneur brings impressive resume to the Hall

(Newton, MA, June 2, 2008) — Auctioneer and businessman Stanley J. Paine was inducted into the Massachusetts Auctioneers Association Hall of Fame on Sunday, May 18. Paine is the youngest person ever to be given such an honor. And while his colleagues were not surprised – mostly due to Paine's status as a prominent foreclosure and estate auctioneer – Paine himself was completely unaware of the impending honor, as his immediate family members and fellow auctioneers had also managed to keep it a secret.

"I am thrilled and incredibly thankful," Paine told friends and colleagues in the packed function room of the Cranwell Resort in Lenox. "I am shocked this happened as soon as it did. I always hoped to receive this type of honor, and to be selected from a group of such exceptionally talented people makes it especially nice."

"I am shocked this happened as soon as it did."

Paine brings to the Hall of Fame a long list of accomplishments in the profession of auctioneering. He is one of the state's foremost real estate foreclosure auctioneers, and has earned a reputation as a leader in the marketing and sale of real estate and personal property through the auction method of marketing. He was vice president of the Brookline Chamber of Commerce from 1991 – 2001, and has been a member of the Newton-Needham Chamber of Commerce since 2002. Additionally, Paine has successfully auctioned abandoned personal property for the Commonwealth of Massachusetts at the State House, and was recently selected by the Commonwealth of Massachusetts to auction state-owned Real Estate.

"I feel like I'm just getting started in this business," said Paine, 59. "There is so much to do, and this honor gives me new energy."

Paine owns Stanley J. Paine Co., Inc. in Newton, and is part owner of Sonia Paine Antiques on Boylston St. in Newton.

Contact: Stanley J. Paine Co., Inc.
http://www.paineauctioneers.com
Tel: (617) 731-4455

Don't get left holding the bag: attorney exposure in the subprime meltdown

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an MDL class action proceeding does not do away with the requirement that a defendant must be subject to personal jurisdiction in the venue where the claim was brought. See *In re Helicopter Crash Near Wendle Creek, B.C.*, 485 F. Supp. 2d 47 (D. Conn. 2007).

The lenders must establish that personal jurisdiction over the closing attorney is proper in the venue of the class action. The usual means to prove jurisdiction is reliance upon state long-arm statutes. Even if lenders demonstrate jurisdiction under the appropriate state long-arm statute, such an exercise of jurisdiction would be subject to federal due process limitations. In other words, non-resident defendant attorneys must have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

As a factual matter, the forum state of the class action may have nothing to do with the lender's location. For example, Ameriquest, which is based in California, is defending an MDL class action in Illinois. Therefore, there is a reasonable likelihood that Massachusetts closing attorneys will not have the minimal contacts with forum states such as Illinois for jurisdictional purposes.

Substantively, the attorneys have other defenses. First, at least one court has held that there is no right of either indemnity or contribution under the federal Truth-in-Lending Act. See *McSherry v. Capital One FSB*, 236 F.R.D. 516 (W.D. Wash. 2006). Second, under Massachusetts lending disclosure requirements, there likewise should be no right of indemnity. See *Horvath v. Adelson, Golden, and Loria, P.C.*, 55 Mass. App. Ct. 1113 (2002) (unpublished order). Finally, by extension, there should be no right of contribution.

Foremost, the facts are usually a strong ally to the closing attorney. As a general matter, counsel who routinely handle residential transactions have a standard package of documents for the closing and, as a matter of practice, provide an executed set of the closing documents to the borrowers and lenders while retaining a copy for the files.

Also, in some instances, the attorneys for the class action plaintiff may decide, as a strategic matter, that they do not want the distraction of third-party defendant closing attorneys in the litigation.

Even the most careful of attorneys may get dragged into these predatory lending class actions. However, attorneys have very strong defenses. The best defense is a properly-documented closing with a well-maintained file.

The 2008 ALTA expanded coverage policies

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this coverage to the Covered Risks.

There is an Exclusion for loss resulting from the exercise of governmental police power or the violation of governmental regulations, but the Exclusion expressly states that it does not limit coverage provided by Covered Risks 8(a), 14, 15, 16,18,19, 20, 23, and 27.

The next Exclusion is for losses resulting from the failure of any portion of the existing structure to be constructed in accordance with applicable building codes. This Exclusion states that it does not limit the coverage provided by either one of those Covered Risks 14 or 15. The provision also states that Exclusion 3 does not limit the coverage described in Covered Risk 17.

The fourth Exclusion contains the more traditional language excluding loss for risks that are created, allowed, or agreed to by the insured, or for loss caused by matters that are known to the insured but not to the title insurer. This Exclusion also makes it clear that the policy does not cover risks that result in no loss to the insured, or that first occur after the Policy Date. Because there is post-policy coverage, however, this last provision does not limit the coverage described in Covered Risks 7, 8e, 25, 26, 27, and 28.

The next provision is the closest thing the Homeowner's Policy has to an exclusion regarding creditor's rights. It excludes coverage for loss resulting from the failure to pay value for the insured's title.

The final Exclusion states that there is no coverage for lack of a right to any land outside the property referred to in paragraph 3 of Schedule A (or, if there is one, the property description), or in any streets, alleys or waterways adjacent to the Land. Naturally, this Exclusion does not limit the coverage enumerated in Covered Risks 11 and 21.

Conditions

Some provisions first appearing in the Conditions of the 2006 Standard Owner Policy are incorporated into the Conditions of the 2008 Homeowner's Policy, while the balance of the terms are essentially the same as those in the Conditions of the 2003 Homeowner's Policy form. In the interests of conserving time and space, the examination of the Conditions will concentrate on those that are new, while summarizing the rest.

The Conditions consist of twelve separate sections. The first section contains the definitions for certain terms such as Land, Natural Person, Policy Date and Public Records.

The second section is titled Continuation of Coverage. The policy provides that the insured is protected "forever," even after the insured conveys the title; but it also states that the policy cannot be assigned to anyone else. Those protected under the policy include the named insured, anyone who inherits the property, and the trustee or successor trustee of a trust to whom the insured subsequently conveys the title.

The third section addresses procedures and the insured's obligations when making a claim. The insured is required to notify the title insurer promptly upon learning of a possible claim. The title insurer may also require the insured to submit a written "proof of loss" describing the nature of the claim and the extent of loss.

The fourth section explains the title insurer's options when it receives a claim. Although almost exactly the same as its counterpart in the 2003 Homeowner's Policy, it is worth listing the choices so that the reader fully understands the options. The title insurer may either pay the claim or negotiate a settlement. The insurer may also bring or defend a legal action related to the claim, in an effort to clear the title. The insurer may also end coverage by paying the insured only the amount of the insured's actual loss resulting from the Covered Risk. In addition, the insurer may choose to end the coverage by paying the insured the amount of the policy then in force, or, where insurance is limited by a deductible and a maximum amount of liability stated in the policy's Schedule A, by paying the amount of insurance then in force for that particular Covered Risk. When the title insurer elects any of these payment options, the insurer's obligations for the claim end, including any obligation to defend.

The next section also addresses the handling of a claim. It emphasizes the obligation of the insured to cooperate with the insurer, and warns the insured that the title insurer is required to only reimburse for settlement costs, attorneys' fees and expenses that the insurer approves in advance. When the insurer initiates or defends a legal action on the insured's behalf, the title insurer has the right to choose the attorney.

The section titled "Limitation of our Liability" contains language taken from both the 2003 Homeowner's Policy and from the 2006 Standard Owner Policy. While outlining more traditional limits on liability, for example, this Condition also provides that if the title insurer pursues its rights under Sections 4.a.(3) and 5.e. and is unsuccessful in clearing the title: (1) the Policy Amount then in force increases by 10% of the Policy Amount shown in Schedule A; and (2) the insured has the right to choose to have the actual loss determined on either the date the claim was made or the date the claim is settled and paid.

The final few sections address subrogation rights, arbitration and the interpretation of the insurance policy. There is also a section providing inflation protection. Under this section titled "Increased Policy Amount," the Policy Amount increases by 10 percent each year for the first five years following the issuance of the policy, up to 150 percent of the Policy Amount.

Schedule A

Schedule A of the new Homeowner's Policy contains the information that one would expect to see in the Schedule A of any title insurance policy. It provides the Policy Amount and the Policy Date. It identifies the insured, the insured interest, and the Land covered by the policy.

Like its predecessor, this new Homeowner's Policy contains a listing of Deductible Amounts and Maximum Dollar Limits of Liability for four Covered Risks: Covered Risks 16, 18, 19, and 21.

Schedule B

Schedule B contains the exceptions from coverage. Existing interests and encumbrances disclosed in a title search of the property are listed here, along with any standard exceptions that the title insurer requires. While the ALTA form is blank, the standard Exceptions in the 2008 Homeowner's Policy will likely resemble those in the 2006 Standard Owner Policy. Agents will be able to omit or endorse out these standard Exceptions if the agents meet certain underwriting guidelines.

Conclusion

The 2008 Homeowner's Policy provides extensive coverage over a variety of risks, but there are also notable limitations on that coverage. The insurance under the 2008 Homeowner's Policy applies only to property that is a residential lot improved with a one-to-four family dwelling, and only when the insured is a Natural Person. Some of the coverage is also modified by the policy's Exclusions, Conditions, Deductible Amounts and Maximum Dollar Limits of Liability in Schedule A and Schedule B Exceptions.

The Exclusions in the 2008 Homeowner's Policy resemble those in previous owner title insurance policy forms, but these Exclusions reflect improvements made to the 2006 Standard Owner Policy forms. For example, the coverage provision of the exceptions to the exclusions in earlier forms has been transferred to the Covered Risks. Many of the Exclusions also include specific carve-out language to clarify that their provisions do not limit the insurance given elsewhere in the policy by certain Covered Risks.

The Conditions have a varied effect on the policy coverage. The title insurer's ability to end its obligation regarding a claim by paying either the amount of policy, the amount of the actual loss, or the amount of insurance then in force recited in the policy's Schedule A for certain Covered Risks, can be viewed as a limitation on the overall liability of the title insurer. On the other hand, the 10% increase in the Policy Amount, when the title insurer tries unsuccessfully to clear the title in the event of a claim, along with the right of the insured to choose either the date the claim was made or the date the claim is finally settled and paid when determining the actual loss, seems to augment the title insurer's liability. Overall, the 2008 Homeowner's Policy takes features of both the 2003 Homeowner's Policy and the 2006 Standard Owner Policy and combines them into an improved, expanded coverage format. It offers the most comprehensive coverage for improved residential property.

Send a letter to the editor!

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

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