REBA NEWS

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The Newsletter of the
Real Estate Bar Association for Massachusetts

Attorney General Martha Coakley discussed her mortgage broker and mortgage lender regulations at REBA's Annual Meeting and Conference. The regulations, which took effect on Jan. 2, codified several forms of mortgage fraud and unfair lending that have contributed to the meltdown in the subprime mortgage market and the resulting residential foreclosure crisis in the commonwealth.

REBA announces professional liability coverage

The Real Estate Bar Association's new professional liability coverage is attracting attention.

If you are a sole practitioner or in a firm of up to nine lawyers, meet with our representatives, complete an application and obtain a premium quotation before you renew your present coverage.

REBA's professional liability coverage, underwritten by The Hartford, is specifically tailored to a Massachusetts-based transactional practice. Various levels of extended reporting periods are available, including for retirement, particle retirement and disability. We can also include business, personal property and liability coverage in a single policy for convenience and single invoicing.

Options are also available for larger practices.

For more information on this important new member benefit, email insurance@reba.net for more information.

Bobrowski, Laurence join REBA Dispute Resolution

New England School of Law Professor Mark Bobrowski and retired Appeals Court Judge Kenneth Laurence have joined the panel of neutral mediators of REBA Dispute Resolution, an affiliate of the Real Estate Bar Association.

About Bobrowski

Bobrowski has been a professor at the New England School of law since 1986, where he teaches land-use law, real property and administrative law. He is also a principal at Blatman, Bobrowski & Mead in Concord.

He is the author of the Handbook of Massachusetts Land Use and Planning Law, now in its second edition. The handbook is frequently cited by the courts of the commonwealth in their reported decisions regarding land use matters. Bobrowski has also written numerous articles on topics ranging from affordable housing to protection of the scenic landscape.

Bobrowski's teaching and practice have focused his expertise to all aspects of zoning, subdivision control and affordable housing. He is frequently engaged by municipalities to assist with large projects, particularly those requiring complicated zoning changes or development agreements. He has served as a mediator with the Massachusetts Office of Dispute Resolution in Chapter 40B affordable housing appeals to the Housing Appeals Committee, litigated dozens of land use cases before the Land Court and Superior Court, and argued many times at the appellate level.

"Professor Bobrowski has an encyclopedic knowledge of land use law," said Rudolph Kass, a member of REBA/DR Board of Directors. "He will be a tremendous resource for us, particularly in the area of Chapter 40B litigation."

Bobrowski has written zoning ordinances and by-laws for nearly 100 of the commonwealth's cities and towns, and is a regular speaker at the conferences of the City Solicitor and Town Counsel Association of Massachusetts, Massachusetts Municipal Association, Massachusetts Continuing Legal Education Program and Massachusetts Building Commissioners Association, among others.

He served on former Gov. Mitt Romney's Task Force for Affordable Housing and now serves on Gov. Deval L. Patrick's Zoning Task Force, charged with reforming the Zoning Act.

About Laurence

Laurence served as an Appeals Court judge from 1990 until 2007. Prior to his appointment to the bench, he

Continued on page 19

From the President's desk

By Paul F. Alphen

Leading a 150-year old bar association, while humbling, is a great honor. This privilege is even greater in light of the almost six years that have passed since our 2002 strategic plan that triggered the association's transformative re-branding and growth.

REBA is not your father's conveyancers association.

In the past six years REBA has become the bar association of choice — not just for conveyancers — but all transactional lawyers and civil litigators across the commonwealth.

But what value does a bar association offer its members — and the legal community at large — in the first place?

Part of our role is to educate lawyers, particularly young lawyers — and the public — on our profession's role in upholding the rule of law in our increasingly variegated society and culture. These protections create a safety net for consumers, businesses and institutions as they navigate transactions both standard and complex.

Transactional lawyers, in particular, are the unsung heroes of every organization and community, serving generously and without fanfare on municipal boards, committees, youth groups and community service organizations. A trained and ex-

Continued on page 3

What's in this issue…

MassATG: for lawyers, by lawyers - page 5

Catching up on indexing standards - page 7

RESPA reform outlook - page 11

A Supplement to Massachusetts Lawyers Weekly

Bankruptcy Code Section 522(P): a homestead trap

By Michael J. Goldberg

In 2005, amendments to the Bankruptcy Code went into effect that had a broad impact on bankruptcy cases — in particular, cases involving individual debtors under Chapter 7 (liquidations) and Chapter 13 (consumer debt adjustment plans). Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. No. 109-8) (BAPCPA).

Among the significant changes to the Bankruptcy Code implemented by BAPCPA are a number of amendments that limit the ability of debtors to make use of exemptions otherwise available under state law. One of these provisions, Bankruptcy Code Section 522(p), contains a significant restriction on a debtor's ability to exempt residential property acquired within a 1,215-day period prior to bankruptcy.

Section 522(p) provides, in pertinent part:

... a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate $125,000 in value in —

(A) real or personal property that the debtor or a dependent of the debtor uses as a residence; ... or

(D) real or personal property that the debtor or dependent of the debtor claims as a homestead.

11 U.S.C. §522(p). Thus, unless the residence or homestead property represents an interest "transferred from a debtor's principal residence ... located in the same State," 11 U.S.C. §522(p)(2)(B) (sometimes called the "rollover provision"), the amount that a debtor may claim under a homestead exemption is limited to $125,000 if the debtor acquired the property within 1,215 days of his or her bankruptcy filing. (Pursuant to Section 104(b)(1) of the Bankruptcy Code, the amount of the Section 522(p) cap is to be adjusted every three years, to reflect changes in the Consumer Price Index. The first such adjustment, effective as of April 1, 2007, resulted in an increase in the cap to $136,875.)

Given the amount of the Massachusetts homestead — $500,000 — this is a very significant potential limitation on a Massachusetts debtor's homestead rights.

The new limitation on homesteads contained in Section 522(p) raises a number of important issues that real estate and estate planning lawyers must be aware of in advising their clients. Among the questions presented by the statute are:

- What if a homestead declaration is filed within 1, 215 days of a bankruptcy? Is it subject to the Section 522(p) limitation?
- What about transfers of property among family members or, even more important, from a trust to its beneficiaries, during the 1,215-day period covered by the statute? Does such a transfer implicate the cap?

Regarding the filing of a homestead declaration within 1,215 days of a bankruptcy filing, Bankruptcy Court Judge Joel B. Rosenthal, in *In re Lyons*, 355 B.R. 387 (Bankr. D. Mass. 2006), stated that it did not implicate the cap and that a homestead exemption filed within 1,215 days of a bankruptcy would therefore not be limited to $125,000. 355 B.R. at 390-91.

"The homestead is not a quantifiable interest; it is a classification of property under state law. Here, the Debtor did not acquire his interest in the Property within 1,215 days; rather, the Property 'acquired' its classification as a homestead during that time. *Id*," Rosenthal stated.

Rosenthal's ruling is in accord with the majority of courts that have ruled on the issue since BAPCPA's enactment. See *In*

Continued on page 12

Mike Goldberg is the principal draftsman of the Real Estate Bar Association's pending comprehensive legislation to overhaul the Massachusetts homestead statutes and harmonize them with current bankruptcy law. He practices with Cohn, Whitesell & Goldberg in Boston. Goldberg is a frequent lecturer on bankruptcy topics, particularly the impact of bankruptcy issues on real estate transactions. He gratefully acknowledges the help of Nathan R. Soucy in the preparation of this article. Mike can be e-mailed at goldberg@cwg11.com.

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

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Mission Statement

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

Mentoring Statement

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

From the President's desk

Continued from page 1

perienced lawyer brings an almost intuitive understanding of process and fairness to every organization and community with which we are involved.

Because lawyers also need advocates, bar associations guard both the interests of our profession and our continued capacity to support all of society. REBA has become the leading voice speaking out for lawyers in Massachusetts. At REBA, we talk the talk *and* we walk the walk. A major part of our mission must be to educate the public — and our legislators on Beacon Hill — on the vital protective role of transactional lawyers, particularly in the real estate arena.

We have heard much in the last year of overreaching, even fraud, in the residential real estate market nationwide. I believe that a lawyer at the closing table best protects the consumer/homeowner from many of the perils reported in the media over the last year. In future columns I will discuss this matter at length and report on REBA's efforts in both the litigation and legislation arenas to protect and serve the member of our profession.

We will report more about our new initiatives in the months ahead, but let me mention several:

- In collaboration with several groups, including Boston's Department of Neighborhood Development, volunteer REBA members will provide pro bono advice to homeowners throughout Massachusetts threatened by foreclosure. The program is tailored to the skills and time-constraints of our member volunteers. More information about this program is available elsewhere in this issue of REBA News;
- I am particularly excited about the launch of the REBA Young Leaders Group. This is an entirely new section, to include both law students and newly admitted lawyers, to focus on networking, practice-building and pragmatic continuing legal education. The Young Leaders program will harmonize with REBA's pioneering peer-to-peer mentoring program;
- Last fall we launched a professional liability insurance benefit specifically designed to meet the needs of sole practitioners and small firms with a transactional practice. Before you renew your coverage this year, get a quote from our underwriting team. This program will bring you substantial savings and more than justify your REBA membership dues.

The year 2008 promises to be another year of growth for REBA. While I welcome the opportunity to serve you, I also urge you to become engaged. Join a REBA committee, sign up for the pro bono program, become a REBA mentor, write an article for this newsletter or register online for our lawyer referral service.

Every lawyer must find an oar to pull.

A partner in the Westford firm of Balas, Alphen & Santos, Paul F. Alphen concentrates in residential and commercial real estate development and land use regulation, administrative law, real estate transactional practice and title examination. He represents national corporations, major regional developers and a wide variety of local concerns. Active in the Westford community, he has served on numerous town and community committees, including eight years as chairman of the DPW Building Committee, and has served as a member of the Master Plan Implementation Committee and school and church building committees. Prior to entering the practice of law, Alphen enjoyed a nine-year career in state and local government. Alphen has a B.A. and M.A. from Boston College, a Masters in Public Administration from Suffolk University, and a Juris Doctor, cum laude, from New England School of Law. Paul has served on the REBA Board of Directors since 2002, and was the original chair of the Zoning and Land Use Committee.

REBA to Hold Pro-Bono Training Seminar

Led by the Association's Affordable Housing Committee, REBA has launched a pilot program with the City of Boston Department of Neighborhood Development (DND) providing pro bono legal counsel to qualifying homeowners facing foreclosure. We are offering this program to homeowners whose income does not exceed 120% of the area mean income for the Boston area. DND will prescreen applicants and refer qualifying homeowners to REBA.

REBA, in conjunction with the Lawyers' Clearinghouse for Affordable Housing and Homelessness, is offering a legal training clinic to participating attorneys prior to referring any cases.

This program will be held at 8:00 a.m. to 10:00 a.m. on Wednesday, February 6th, 2008. It will be held in the Brigham Room at Citizens Bank, located at 53 State Street, 8th floor, in downtown Boston. Breakfast will be served.

You must RSVP to this event in order to attend. To do so, please send your RSVP to probono@reba.net. For questions, please contact Joseph McBride, Member Service Administrator at (617) 854-7555.

Our goal is to establish a pro bono opportunity for REBA members that is tailored to their skills, their resources, and their availability and which also satisfies the SJC goal that each attorney provide 25 hours of pro bono public assistance each year. In the event that the pilot program is successful, we anticipate a second phase of the program that would expand the program state-wide and possibly involve representation of higher income homeowners facing foreclosure on a reduced fee basis.

Enforceability of prepayment premiums in Mass.

By Beth H. Mitchell and Karen E. Zuck

ZUCK

MITCHELL

Prepayment premiums in commercial mortgage agreements provide compensation to lenders for losses incurred when borrowers repay their loans prior to the maturity date.

The many different ways premiums can be formulated, the different levels of analyses available to courts, and the unique position of each borrower and lender under the applicable loan documents have led courts to reach differing conclusions regarding the enforceability of prepayment premiums.

An associate in the real estate practice group at Nutter, McClennen & Fish, Karen Zuck graduated cum laude from Bucknell University and received her J.D. from the University of Pennsylvania Law School. Beth Mitchell serves on the association's Executive Committee and chairs the Commercial Real Estate Finance Committee. Currently, she is a member of the Board of Directors of the Greater Boston Real Estate Board. At Nutter, she is a partner in the firm's real estate and finance department and co-chairs the firm's commercial finance practice group. She frequently writes and lectures on real estate topics.

Voluntary vs. involuntary prepayment

Clean Harbors, Inc. v. John Hancock Life Insurance Co., a case heard by the Appeals Court in 2005, outlined the analysis Massachusetts courts undertake to determine the enforceability of involuntary and voluntary prepayment premiums. 64 Mass. App. Ct. 347, 356 (2005).

Generally, unless the loan documents expressly provide for a prepayment premium upon acceleration of the loan, lenders' demands for involuntary prepayment premiums have been disallowed by courts. Id. at 356 (noting the same). Where the loan documents expressly provide for a prepayment premium upon acceleration, however, courts have commonly enforced such provisions.

Massachusetts courts consider these prepayment premiums to be a form of liquidated damages, enforcing them if the actual damages incurred by the lender because of the prepayment are difficult to determine when the parties enter the agreement, and the premium amount is a reasonable approximation of those damages. Id. at 355.

In contrast, because a voluntary prepayment reflects the borrower's decision to pay off the loan earlier than necessary, courts consider prepayment premiums in these cases to be part of the bargained-for agreements. This rationale leads courts to a considerably more lenient standard of review than for involuntary premium cases. Courts apply a rational relation test, enforcing the premium if it is rationally related to the lender's anticipated losses as a result of the prepayment. Id. at 357.

An important factor contributing to the enforceability of many voluntary prepayment premiums is that courts are hesitant to alter the terms of a contract between experienced and competent parties. Id. at 364.

Treatment of premiums in bankruptcy cases

Bankruptcy courts consider prepayment premiums in light of the federal Bankruptcy Code. *UPS Capital Business Credit v. Gencarelli* (*In re Gencarelli*), a recent 1st U.S. Circuit Court of Appeals case, set the standard that will likely govern Massachusetts bankruptcy decisions in the future. 501 F.3d 1 (1st Cir. 2007).

The court held that prepayment premiums can be recoverable from bankrupt borrowers as unsecured claims under Section 502, even if they cannot be deemed to be part of the creditor's secured claim under Section 506 of the Bankruptcy Code. Id. at 11. To be recoverable under Section 502, the prepayment premium must be provided for in the loan documents, and it also must be enforceable according to applicable state law. 11 U.S.C. § 502(b)(1). In contrast, Section 506(b) of the code only allows for the recovery of secured claims for "any reasonable fees, costs, or charges." 11 U.S.C. § 506(b).

An important factor contributing to the enforceability of many voluntary prepayment premiums is that courts are hesitant to alter the terms of a contract between experienced and competent parties.

Accordingly, the court in *Gencarelli* recognized that a lender's claim for prepayment fees that did not meet the reasonableness requirement of Section 506(b) could nevertheless still be recovered as an unsecured claim under Section 502. 501 F.3d at 11.

Gencarelli provided an unusual set of facts for a bankruptcy case, since the debtor was, in fact, solvent and all creditors were being paid in full. Accordingly, the *Gencarelli* court declined to address the significant issue of what the proper level of analysis should be to determine if a prepayment premium is enforceable under the federal standard of reasonableness. Id. at 18.

Prior case law, however, evidences two types of analysis commonly used: some courts have applied a liquidated damages analysis just as in involuntary prepayment premium cases, while others consider the actual damages incurred as the only measure of a reasonable premium. See *In re A.J. Lane & Co.*, 113 B.R. 821, 827 (Bankr. D. Mass. 1990) (applying a liquidated damages analysis); *Ferrari v. Barclays Am./Bus. Credit, Inc.* (*In re Morse Tool, Inc.*), 87 B.R. 745, 750 (Bankr. D. Mass. 1988) (holding that actual damages are the only measure of a reasonable premium).

Whether a debtor is solvent or insolvent clearly influences the enforceability of prepayment premiums in bankruptcy. When dealing with solvent debtors, bankruptcy courts tend to enforce any contractual provision that is enforceable under state law, including

Continued on page 14

MassATG: a title group for lawyers, by lawyers

By Thomas Bussone II

I am proud to be a lawyer and proud to be a real estate conveyancer. Helping clients achieve their dreams of home ownership has been among the most rewarding aspects of my professional life. This satisfaction is rooted in my belief that my clients have been well-represented and well-protected, and their investments have been secure.

Our citizens and homeowners can obtain this security and peace of mind only when represented by competent independent counsel. For most of my career, conveyancing attorneys have represented the parties to real estate purchase and refinance transactions founded on the general recognition and acceptance of our value service to clients. In the past decade, however the national title insurance and settlement services industries challenged our traditional role. That aggressiveness stirred my passion, and I became an active member of the Real Estate Bar Association.

Years ago, REBA established that conveyancing was the practice of law in both the *Closings Ltd.* (1996) and *Colonial Title and Escrow* (2001) cases. More recently, our out-of-state adversaries have flouted these Superior Court decisions. Notaries, signing services and title agencies appeared at closing tables across the commonwealth.

TAVMA, a trade association for title insurers, title agents and vendor management companies, sought legislation that would give these non-lawyer groups the authority to close real estate transactions. REBA worked tirelessly to educate our representatives and senators on why such legislation would hurt consumers.

To date, REBA has prevailed, but at a considerable expense.

When it became clear that some title agencies would operate here without regard to our law and customs, REBA filed a civil action against the National Real Estate Information Services, one of the major providers of such services.

While the NREIS litigation was vitally necessary, it has been costly.

To support REBA and this cause, I repeatedly traveled across the commonwealth speaking to groups of conveyancers to raise money to support our litigation. In Hampshire, Berkshire, Barnstable, Plymouth and Essex counties, local grass-roots groups, or "mini-REBAs," were organized. We also challenged the title insurance underwriters to help us.

CATIC was the first to step forward with a $25,000 donation. First American, Stewart and others followed. In all, we raised $185,000 to support REBA's efforts. This was a highly successful campaign.

However, REBA's financial needs are ongoing. Both the litigation and lobbying programs have become multi-year efforts. We cannot go back to the members year after year to support these efforts. While our hearts are willing, our resources cannot match those of our national corporate opponents.

From this realization, Massachusetts Attorneys Title Group was conceived.

Today, I am working to bring MassATG to life. MassATG, exclusively owned and operated by Massachusetts lawyers, will be dedicated to preserving and promoting the role of conveyancers in real estate transactions across the commonwealth. Its profits will support the real estate bar.

MassATG will be governed by an independent board of directors elected from its membership.

We anticipate a close working relationship with REBA and its mission. As a member of MassATG, every real estate attorney can now protect Massachusetts consumers and support the profession without paying increasingly burdensome dues or special assessments.

Conveyancers across Massachusetts are supporting MassATG, and many have become members.

To learn more about MassATG, its structure and mission, or to become a member, e-mail tbussone@sebflaw.com or log on to www.Massatg.com.

Prior to founding the Massachusetts Attorneys Title Group, Tom Bussone served on REBA's Board of Directors and Executive Committee. He practices law in Beverly with Segal, Edelstein, Bussone & Fallon. He can be e-mailed at tbussone@sebflaw.com.

1st Circuit reverses Sudbury condo phasing case

By Robert J. Galvin

In re: Northwood Properties, LLC was a U.S. District Court decision that, if allowed to stand, would have deprived developers of the flexibility they need in order to successfully develop phased condominium projects.

Northwood Properties was the developer of the Northwood at Sudbury Condominium, which was to consist of five phases. Northwood completed just two phases before its phasing rights expired. Northwood filed a voluntary petition under Chapter 11, which is why the case is in federal court.

Northwood filed a proposed plan that was contingent upon Northwood obtaining a revival of phasing rights. The court said, "At stake are development rights potentially worth millions of dollars. The result is a barroom brawl for control of these rights … the phasing rights may be worth up to $3 million, more than enough to satisfy all debts."

Two of the plaintiffs objected to the revival of the phasing rights on grounds that as unit owners, their express consent would be required before Northwood could add new units to the condominium. They argued that their express consent was required because of the provisions of Section 5(b)(1) of Chapter 183A.

Section 5 (a) of Chapter 183A provides that "each unit owner shall be entitled to an undivided interest on the common areas and facilities in the percentage set forth in the master deed. Such percentage shall be in the approximate relation that the fair value of the unit on the date of the master deed bears to the then aggregate fair value of all units."

In 1998, Section 5(b)(1) was added to Chapter 183A. This enactment states, in relevant part, "provided, however, that the acceptance and recording of the unit deed shall constitute consent by the grantee to the addition of subsequent units or land or both to the condominium and consent to the reduction of the undivided interest of the unit owner if the master deed at the time of the recording of the unit deed provided for the addition of units or land *and made possible an accurate determination of the alteration of each unit's undivided interest that would result therefrom."*

This wording created the difficultly at the heart of this case. When the 1998 amendment was enacted, it puzzled some practitioners. What was the purpose of the language, "made possible an accurate determination," when the only method for apportioning the percentage interest of each unit in the common areas and facilities was provided by Section 5(a) — the fair value of the unit in question compared to the fair value of all the units?

The plaintiffs claimed that the language in Section 5(b)(1), "make an accurate determination," meant that they had veto power over the revival of phasing rights because the master deed didn't precisely state what the percentage appurtenant to their units would be as a result of the extension of the phasing rights.

The Bankruptcy Court held that Section 5(b)(1) did not require such precision.

The District Court, reversing the Bankruptcy Court, decided in favor of the plaintiffs, holding, in essence, that they had veto power over any phasing plan unless the master deed specifically stated what the precise percentages would be in each phase, or at least provided for the calculation of precise percentages.

The problem with the District Court's analysis was threefold:

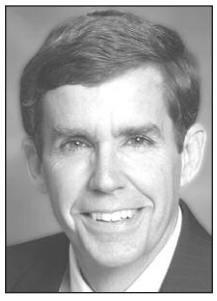
First, Section 5(a) has always provid-

Continued on page 14

A longtime member of the Real Estate Bar Association, Bob Galvin practices in the land use and real estate group at Davis, Malm & D'Agostine in Boston. He authored the brief filed in the Northwood *case on behalf of the REBA Amicus Committee. He is considered by many to be the dean of the condominium association bar. He specializes in commercial and residential real estate, commercial leasing and commercial, industrial, residential and mixed-use condominiums. Galvin is editor and co-author of "Massachusetts Condominium Law," and author of the condominium chapter in "Crocker's Notes on Common Forms," both MCLE publications. He can be e-mailed at rgalvin@davismalm.com.*

Catching up on indexing standards

By Richard P. Howe Jr.



A kinder, gentler version of the document formatting standards first proposed for the commonwealth two years ago went into effect on Jan. 1. The biggest change in the new version involves the elimination of strict margin requirements in favor of a more flexible standard that requires "margins on all sides of all document pages [to] be of sufficient size to be legibly reproduced on standard registry scanners."

The previous formatting standards called for a strict, one-inch margin on all sides of the document with a three-inch blank space across the top of the first page. These marginal dimensions would have caused thousands of documents to be rejected, which is the primary reason the earlier version was never implemented.

Around the country, the earliest efforts at formatting standards embraced such easily quantifiable requirements for margins, paper weight and font size. In a business that has long been dominated by widely varying local practices, such objective measurements were quite attractive. They were also illusionary. How would a registry recording clerk tell the difference between 20-pound and 18-pound paper? Would a micrometer be necessary to distinguish between nine-point and 10-point fonts? Would all documents have to pass a "ruler test" at the recording counter to ensure that margins were a full one-inch?

You can imagine the disaster that would ensue when million-dollar mortgages were rejected for insufficient font sizes and moving vans stalled in driveways because the margins on the deed did not pass muster. The new standards are more realistic, but their success relies on the continuous exercise of common sense by all involved.

With that in mind, here they are:

Documents recorded after Jan. 1, 2008, must meet the following requirements:

- Be on white paper of sufficient weight to reproduce in registry scanners;
- All document pages and attachments must be on paper that is no larger than 8.5 inches by 14 inches;
- Printing shall be on one side only; double-sided pages will not be accepted;
- Documents that contain printing, writing or other markings must be sufficiently dark in appearance to be legibly reproduced on standard registry scanners;
- All printing and writing on a document must be of sufficient size to be legibly reproduced on standard registry scanners;
- Margins on all sides of all document pages must be of sufficient size to be legibly reproduced on standard registry scanners;
- The first page of all documents must contain a "recording information area" in the upper right hand corner measuring three inches from the top edge of the document and three inches from the right edge of the document that is free from all writing or printing; and
- Documents that do not comply with Formatting Standard 7 above may still be recorded when attached to an official registry Document Cover Sheet or through the use of some other method adopted by the registry.

Even with the more flexible language of these new standards, some points of conflict are predictable. Other governmental entities will undoubtedly continue to produce municipal lien certificates and death certificates on green and blue paper.

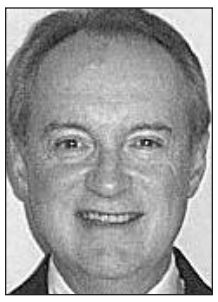
Recognizing that documents produced by cities and towns are out of the control of the customer, the Middlesex North Registry of Deeds will be hesitant to reject such documents outright, but will work with our equipment to get an adequate digital image. However, the registry will be less tolerant of documents on colored paper produced by non-gov-

Continued on page 16

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.

Midterm observations: state should applaud progress

By Edward J. Smith



It is often difficult to predict the new policy outcomes of a legislative term, particularly when it falls at the beginning of a new governor's administration.

The natural inclination of a legislature is primarily to be reactive, either to a governor's agenda or to events outside the capital.

Particularly important to the generation of political leaders in Massachusetts who came of age in the 1990s has been the realization that the state will not do well for its people in the national and global marketplaces unless it competes effectively with key states in targeted industries.

State fiscal policy on both the tax and expenditure sides has reflected a strong desire in both the legislative and executive branches to promote and sustain economic development — particularly job growth.

Many observers have noted with some irony, given the return of one-party control of the political branches after a 16-year hiatus, that the current legislative leadership seems more at odds with Gov. Deval L. Patrick's agenda than most people would have expected.

A further irony in the political landscape appears in the somewhat conservative policy tendencies that have been demonstrated by not only House Speaker Salvatore F. DiMasi and Senate President Therese Murray, both with liberal track records, but also a governor whose candidacy was more left of center than all of his election opponents.

Some will argue that this is more the result of a shared awareness of what is achievable than a reflection of political philosophy. Others will cite as reason a certain 1990s slogan: "It's the economy, stupid!" Whatever the reason, there are signs that the three of them share a belief that their legacies will be made by what they can achieve by targeted investments in state assets, particularly through capital spending.

State fiscal policy on both the tax and expenditure sides has reflected a strong desire in both the legislative and executive branches to promote and sustain economic development — particularly job growth.

As Patrick's list of capital spending requests approaches $12 billion, it is clear that quality-of-life issues in Massachusetts are important to him.

In December 2007, he filed a $1.4 billion bill that would make investments in energy and the environment over five years, also priorities of DiMasi and Murray. Patrick has also filed a $4.8 billion transportation bond bill (which also relies on $1.9 billion in federal spending), a $1.1 billion housing bond bill, a $2 billion higher education bond bill and a $1 billion life sciences bond bill. None of those bond bills has yet advanced in the Legislature, although it did pass a $1.5 billion bond bill in March to address immediate capital needs.

The environmental bond bill is twice the size of the last environmental bond bill, which was approved in 2002. It authorizes $665 million in state borrowing for "infrastructure and park assets," including $250 million for the design and construction of bridges that the administration describes as in "dire need of re-

Continued on page 16

Ed Smith, who has served as the Real Estate Bar Association's legislative counsel for more than 20 years, is a thoughtful observer and commentator of the culture and folkways of Beacon Hill. He is a regular contributor to REBA News. Smith can be e-mail at edwardjsmith@verizon.net.

ALTA approves revised closing protection letters

By Jonathan S.R. Anderson

The American Land Title Association (ALTA) has approved three new closing protection letter forms. These forms do not significantly change the coverage traditionally provided by closing protection letters (sometimes referred to as insured closing letters), but these new forms do clarify the extent of the title insurer's liability and the limitations on that liability.

These new forms do clarify the extent of the title insurer's liability and the limitations on that liability.

Discussion

The closing protection letter is a document that is almost always requested by a lender when that lender is securing a loan or other obligation with a mortgage on real property and the mortgage is being insured with a title insurance policy.

In cases where an agent of the insurer is representing the borrower and/or the lender, and is also issuing the title policy insuring the lender, the lender will require that the title insurer issue a closing protection letter regarding the agent.

The closing protection letter (CPL) identifies the agent and confirms that the agent is either an "issuing agent" or an "approved attorney." An issuing agent is authorized to issue a title insurance policy on behalf of the title insurer, while an approved attorney is one whose opinion of title is relied upon by the title insurer when issuing a policy.

After confirming that the party identified is an agent for the title insurer, the insurer issuing the CPL agrees to reimburse the addressee (usually a lender but may also be either a purchaser or a lessee) for certain types of losses caused by the agent in connection with the agent's closing of a real estate transaction or transactions.

More precisely, the title insurer agrees to reimburse the addressee for actual losses incurred when the loss arises out of:

(1) Failure of the agent to comply with the lender's written closing instructions, but only to the extent those instructions relate to the status of title or the validity, enforceability and priority of the lender's mortgage, or if the instructions require the agent to obtain documents, but only to the extent that the agent's failure to obtain the documents affects the status of title or the validity, enforceability and priority of the mortgage; or

(2) Fraud, dishonesty or negligence in handling funds or documents in connection with the closing, but only to the extent that the fraud, negligence or dishonesty relates to the status of title or to the validity, enforceability and priority of the mortgage.

The indemnity provisions appearing in the CPL make it clear that the liability of the title insurer is limited to cases where the agent's conduct affects the status of title or the validity, enforceability and priority of the mortgage. Older CPL forms were sometimes rejected by state regulators because they did not contain this clarifying language, leading the regulators to conclude that the indemnity provisions were overly broad (that is, not tied to the title-related losses).

As in prior versions, the revised CPL forms contain conditions and exclusions further clarifying the title insurers' liability. Under the basic CPL form, a title insurer issuing the letter will not be liable for loss resulting from either:

A. Failure of the agent to comply with closing instructions when those instructions require title insurance coverage that is inconsistent with a related policy binder or commitment (but this condition does not apply to situations where the instructions require either the removal of specific exceptions or compliance with requirements set out in the binder or commitment);

B. Loss or impairment of funds on deposit in a bank due to the bank's failure or insolvency (but this condition does not apply to cases where the loss results from an agent's failure to comply with the lender's specific closing instructions to deposit the funds in a particular bank);

C. Defects, liens or encumbrances affecting any purchase, lease or loan transactions (except, of course, when a policy of title insurance issued pursuant to the addressee's closing instructions provides protection against those defects, liens and encumbrances);

D. Fraud, dishonesty or negligence of the addressee's employee, agent, attorney or broker;

E. The addressee's settlement or release of any claim without the written

Continued on page 15

Jon Anderson is a senior title counsel and has been with CATIC for more than 20 years. He is a member of the Forms Committee of the American Land Title Association. He is also a member of the Real Property Section and a former chair of the Affordable Housing and Homelessness Committee of the Connecticut Bar Association. Anderson is a graduate of Connecticut College, Quinnipiac University School of Law and the University of Connecticut School of Business. He can be e-mailed at janderson@caticaccess.com.

Hampden County lawyers publish consumer brochure

The recently-established Real Estate Section of the Hampden County Bar Association has published a consumer brochure and mission statement entitled "Bringing Closings Home."

The group, with close ties to the Real Estate Bar Association's Residential Conveyancing Committee, is dedicated to the proposition that local real estate lawyers provide the best legal counsel to all parties involved in local real estate transactions.

BRUNNER

"It is our goal to preserve and strengthen the current role of real estate attorneys in the closing process and promote conveyancing attorneys as an important source of legal advice in all real estate matters," said Douglas J. Brunner, a Springfield-based conveyancer and one of the group's founders. Brunner is also a member of REBA's Residential Conveyancing Committee.

The Real Estate Section of the Hampden County Bar Association is one of a number of grassroots organizations closely associated with REBA that have emerged across the commonwealth. Other groups have been established in Berkshire, Essex, Plymouth and Barnstable counties.

For more information about joining the Real Estate Section of the Hampden County Bar Association, call Brunner at (413) 871-1202 or e-mail djb@titlebound.com.

Essex bar establishes real estate section

In response to the Real Estate Bar Association's grassroots outreach to local and regional bar associations, the Essex County Bar Association has established a real estate section, chaired by long-time REBA member Christopher L. Plunkett, who practices in Salem.

PLUNKETT

"We recognized that we needed to become more active at the local level in response to challenges in the marketplace, particularly with the practice of law by non-lawyers issue," said Plunkett. "We look forward to working closely with REBA's Residential Conveyancing Committee and Conveyancers Leadership Council."

The group, with 40 lawyer-members, has met once with REBA leaders, including Residential Conveyancing Committee Co-Chair Michelle T. Simons, and it plans to hold several meetings in 2008.

The Essex County group joins "mini-REBA's" in Hampden, Berkshire, Plymouth and Barnstable counties.

The group welcomes new members from the Essex County area. Those interested in joining should call Plunkett at (978) 744-2555 or e-mail clp@clpunkett.com.

Washington notes: RESPA reform outlook for 2008

By Joel A. Stein

Both Congress and the Department of Housing and Urban Development will be examining RESPA reform in 2008.

House Bill 3915, entitled The Mortgage Reform and Anti-Predatory Lending Act of 2007, was approved by the House Financial Services Committee by a vote of 45 to 19 on Nov. 7, 2007. This legislation would create a licensing system for residential mortgage originators and a minimum standard requiring that borrowers have a reasonable ability to repay a loan.

Although the original legislation deals with the hot-topic issues of predatory lending — the licensing of originators — an amendment by Rep. Chris Val Hollen, D-Md., includes broad language stating, "… in the case of a residential mortgage loan, any costs incurred with the consummation of the loan may not exceed by more than ten percent the estimate of the amount of such costs disclosed to the consumer in advance of the consummation of the loan." This pre-closing estimate is known as a "good faith estimate," or GFE.

In the past, both the national Mortgage Bankers Association and National Association of Mortgage Brokers have provided counsel and input to HUD to reform the good faith estimate process. According to the informational website RESPA.com, NAMB's proposal requires a mandatory re-disclosure before the consumer-borrower reaches the closing table if settlement costs are 10 percent higher than on the original good faith estimate, or if there is any change in the interest rate disclosed in the original good faith estimate.

Shortly after the introduction of House Bill 3915, there were hints from HUD and others that new RESPA rules would be released for public comment in January 2008. According to information that HUD provided to the federal Office of Management and Budget's Office of Information and Regulatory Affairs, the proposed rule "would improve and standardize the Good Faith Estimate form making it easier to use for shopping among settlement providers and help borrowers on how yield spread premiums (YSP) can affect their settlement charges." Reports claim that the new Good Faith Estimate form will be four pages long and the new HUD-1 Settlement Statement will be three pages long.

Both trade organizations, the MBA and the NAMB, have released their own proposals to reform the Good Faith Estimate. The MBA has proposed several versions of the GFE, all of which include disclosures by mortgage brokers of the yield spread premium on the GFE.

The NAMB's proposal is one page in length, mirroring the HUD-1 and disclosing the role of the originator. The NAMB proposal also mandates re-disclosure if final settlement costs increase by more than 10 percent of the original GFE, or if interest rates increase. This proposal also includes a private right of action to enforce the GFE tolerance limits. However, the proposed NAMB good faith estimate does not disclose yield spread premiums, on the grounds that disclosing compensation, rather than costs, is confusing to the consumer.

HUD's prior attempts to revise and expand the good faith estimate from one to four pages retained the yield spread premium disclosure, characterizing it as a "credit to the borrower."

For its part, the MBA has asked members to comment on three options for the RESPA report. Each option would include a one-page good faith estimate that would:

- State that the good faith estimate is based on information provided by the borrower;
- Describe the loan's characteristics, including amount, term, prepayment provisions or interest-only features;
- Describe the interest rate, points, estimated monthly payment and Annual Percentage Rate;
- Describe the settlement charges in nine major categories; and
- Disclose the maximum amount of lender payments to the mortgage broker including any yield spread premiums.

The second MBA option would include those five provisions while creating reasonable tolerances for a variation of lender and mortgage broker charges of up to 2 percent.

The third option would include all of options 1 and 2 as well as a 10-percent variation tolerance for third-party costs.

I will continue to follow the reactions of major lender and trade groups on RESPA reform and report in upcoming issues of REBA News. We invite input from REBA members and offer our comments to HUD as well as members of the Massachusetts congressional delegation.

Joel Stein chairs the REBA Title Insurance and National Affairs Committee and is a frequent commentator on regulatory matters in REBA News. In 2007, he was given the Richard B. Johnson Award, the association's highest honor. He can be e-mail at jstein@steintitle.com.

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Bankruptcy Code Section 522(P): a homestead trap

Continued from page 2

re Rogers, 354 B.R. 792 (N.D. Tex. 2006); *In re Reinhard*, 377 B.R. 315 (Bankr. N. D. Fla. 2007); *cf. In re Rasmussen*, 349 B.R. 747 (Bankr. M.D. Fla. 2006) (appreciation in value of equity during 1,215-day period does not constitute acquisition of an interest under §522(p)); but see *In re Greene*, 346 B.R. 835 (Bankr. D. Nev. 2006).

The status of a homestead filing made during the 1,215-day period under 522(p) is but one of the difficult questions arising under the statute. What if a debtor acquires property from a family member, or an affiliated entity, such as a limited liability partnership in which he or she holds an interest, during the 1,215-day period? Does the §522(p) limitation of the statute apply under those circumstances?

The simple answer is that it does.

In *In re Zecher*, a debtor's homestead in residential property he acquired from a limited liability partnership within 1,215 days of the bankruptcy was capped at $125,000 — even though he was the sole partner in the LLP. 2006 WL 3519316 (Bankr. D. Mass. 2006) (Hillman, J.).

In *In re Leung*, 356 B.R. 317 (Bankr. D. Mass. 2006), the debtor's wife transferred the residence to herself and the debtor, as tenants by the entirety, after which the debtor filed a homestead declaration; the transfer and declaration took place approximately seven months before the debtor's bankruptcy filing.

Bankruptcy Court Judge William C. Hillman held that the debtor's exemption would be limited to $125,000, because the debtor acquired his interest in the property — which had served as his residence prior thereto — within 1,215 days of the bankruptcy filing. *Id.*; but see *In re Walsh*, 359 B.R. 389 (Bankr. D. Mass. 2007) (Somma, J.) ($125,000 not applied where, after transfer from one spouse to both as tenants by the entirety, the *non-debtor spouse* filed the declaration of homestead).

Trusts, especially nominee trusts, raise particular problems under §522(p).

Governing Massachusetts precedent indicates that beneficiaries of a nominee trust may not file declarations of homestead. See *Assistant Recorder of the North Registry Dist. of Bristol County v. Spinelli*, 38 Mass App. Ct. 655 (1995). Thus, beneficiaries desiring such protection are compelled to transfer homestead property to themselves, so that one or more may file a declaration of homestead with respect to his or her interest in the property. Once again, the question arises whether, if the transfer occurs within §522(p) period, the debtor is prevented from obtaining the full benefit of the homestead.

To avoid the application of §522(p), one debtor has argued that, where the nominee trust holding the homestead property prior to its conveyance to the beneficiaries (one of whom thereafter filed a homestead declaration) had a complete identity of trustees and beneficiaries, no transfer occurred triggering the $125,000 limitation. See *Khan v. Bankowski (In re Khan)*, 375 B.R. 5 (1st Cir. B.A.P. 2007).

Although the Bankruptcy Appellate Panel for the 1st U.S. Circuit Court of Appeals appeared sympathetic to this argument — noting that, "in a nominee trust, the legal title of the trustee and the equitable title of the beneficiary merge when the same person hold both titles" — the court permitted the §522(p) cap to apply because the debtor had failed to make an adequate evidentiary record of the characteristics of the nominee trust. *Id.* at 9, 13.

Notably, even if the panel had ruled in favor of the debtor, its decision would only have provided protection to nominee trusts, but not other forms of trust, and only where there is complete identity of trustees and beneficiaries.

In the *Khan* decision, the panel cited favorably to the decision of Judge Henry J. Boroff in *In re Szwyd*, in which Boroff permitted a sole beneficiary of a nominee trust, of which he was also the sole trustee, to have the benefit of his homestead declaration. 346 B.R. 290 (Bankr. D. Mass. 2006), aff'd, 370 B.R. 882 (1st Cir. B.A.P. 2007).

Both Boroff and the *Khan* court noted the significant question that existed over the continuing vitality of the *Spinelli* decision, particularly in light of subsequent Supreme Judicial Court precedent holding, in contrast to *Spinelli*, that the homestead exemption "should be construed liberally in favor of the debtor." See *Dwyer v. Campellin*, 424 Mass. 26 (1996). However, both courts made clear that the vitality of *Spinelli* was an issue that the SJC would have to address.

Certainly, the problem of §522(p)'s applicability to transfers by trust beneficiaries could be cured if beneficiaries were permitted under Massachusetts law to file homestead declarations. With that change in the law, beneficiaries would no longer be confronted with a choice between no homestead at all (if the property remains in trust), or a very limited homestead exemption (if a transfer to the beneficiaries occurs within 1,215 days of bankruptcy).

The Real Estate Bar Association has a bill before the Legislature that, if enacted, would provide for substantial amendments to Chapter 188.

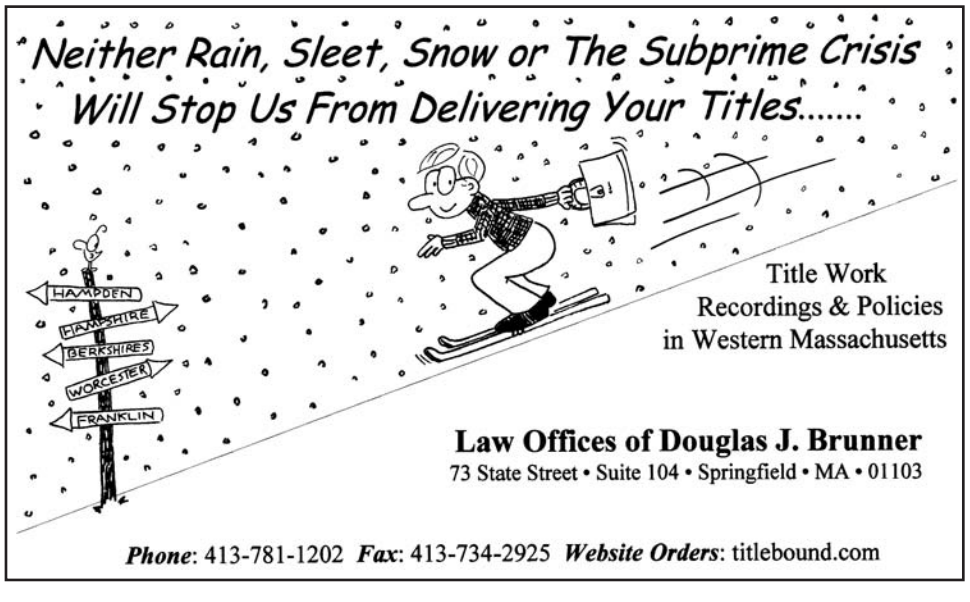
In general, the proposed amendments would clarify many of the ambiguities and inconsistencies in the statute and, in the process, modernize its terms and make it fairer to Massachusetts debtors.

One of the more significant provisions of the REBA bill is that it makes homestead protections available to trust beneficiaries. Passage of this bill would be a great aid to debtors who hold beneficial interests in homestead property — not to mention the lawyers who represent them — and avoid many of the problems addressed in the *Khan* and *Szwyd* decisions.

In the meantime, real estate practitioners and trusts and estates lawyers are well-advised to keep Section 522(p) in mind when advising clients. Transfers of property for any reason — whether by one spouse to another, or from one spouse to both as tenants by the entirety — are likely to subject an individual to a substantially reduced homestead exemption amount. As discussed, so are transfers of property by trusts (including nominee trusts) to their beneficiaries — even when those transfers are made to enable trust beneficiaries to obtain homestead protection under current Massachusetts law.

As a rule, counsel should take care to caution clients concerning these potential risks, which can become quite real as a result of later-arising financial difficulties, when advising them whether to hold a personal residence in trust.

Only careful planning in light of §522(p) will enable counsel to avoid the harsh result of the Bankruptcy Code's new significant limitation on Massachusetts homesteads.



New legislation adjusts foreclosure process

By Francis J. Nolan

On Nov. 30, 2007, in the latest of a series of governmental actions aimed at stemming the tide of mortgage defaults and foreclosures, Gov. Deval L. Patrick signed a bill requiring lenders to send a new statutory default notice to many borrowers facing delinquency.

The bill also requires lenders to notify the Division of Banks about loans in default and mortgage foreclosures so the division can establish and maintain an accurate database of foreclosure activity in the state.

Effective May 1, 2008, a mortgagee cannot commence foreclosure for nonpayment unless the mortgagee has sent a 90-day notice advising the mortgagor of his or her right to cure the default. The new statutory notice must contain information about the default and how, where and when to cure it.

Among other things, the notice must provide a mechanism by which the mortgagor can contest the accuracy of the lender's figures. The notice must also include contact information for the Massachusetts Housing Finance Agency and the Division of Banks.

The notice requirement applies only to mortgages secured by a one-to-four-family residential dwelling occupied at least in part by the mortgagor. The legislation states that the right to cure under the new law "shall be granted once during any 5 year period," which suggests that borrowers who cure a delinquency but fall behind again within five years thereafter would not be entitled to a second 90 day notice.

The new statute requires the mortgagee to send a copy of the 90-day notice to the Division of Banks. The Division will track and analyze trends in foreclosures, including the frequency of 90-day notices relative to the frequency of completed foreclosure actions.

A copy of the notice, along with an affidavit of compliance, must be "filed … in any action or proceeding to foreclose on such residential real property." The bill does not state where the notice must be filed, but indications from the Legislature suggest that lawmakers intended the lender to file an affidavit with the Land Court or Superior Court.

The legislation also requires foreclosing lenders to notify the Division of Banks of the auction date and sale price of any completed foreclosure.

Assignments and mortgages must now include the name, address and license number of any mortgage broker and/or originator involved in the mortgage, if known. If no broker or originator is involved in the mortgage, the mortgage and any subsequent assignment must reflect that fact. This requirement poses challenges to lenders who have acquired mortgage rights via previous assignments. However, the statute indicates that failure to comply with the requirement will not invalidate the mortgage or assignment, thus avoiding a potential problem for closing attorneys who might otherwise have been forced to follow up on assignments that lack the proper reference.

Mortgagees must now provide a written itemized accounting of sale proceeds to the mortgagor. The accounting must include the sale price, legal fees, auctioneer fees, publication costs and other fees, as well as the amount of surplus due to the mortgagor. It is unclear from the language in the bill whether the accounting provision applies solely to foreclosures that generate a surplus balance.

Effective May 1, 2008, a mortgagee cannot commence foreclosure for non-payment unless the mortgagee has sent a 90-day notice advising the mortgagor of his or her right to cure the default. The new statutory notice must contain information about the default and how, where and when to cure it.

The accounting must be provided within 60 days after the mortgagee receives the proceeds from the auction purchaser, unless the sale is subject to further legal proceedings, in which case the 60 day period is stayed.

The statute relating to loan modifications was amended to allow a lender to change an adjustable or variable rate mortgage to a fixed rate mortgage as part of a modification plan. The allowable fee for loan modifications was also increased.

The legislation also changed existing law regarding the rights of tenants in a foreclosure context. Tenants living in a property prior to foreclosure as tenants-at-will, or under an unexpired lease, will now be considered tenants-at-will after the foreclosure. The change to the eviction law takes effect immediately, unlike the section of the bill relating to 90 day notices.

A new statutory section, G.L.c. 255F, addresses the licensure of mortgage loan originators. The statute requires applicants to submit an application, undergo a thorough background check, work only for a regulated entity, and complete ongoing continuing education courses in order to maintain the license.

Chapter 255E, which relates to the licensure of mortgage lenders and brokers, was amended to require the Division of Banks to inspect licensees' records and compile a written evaluation of each licensee. The evaluation reviews how well the lender is "meet[ing] the mortgage loan credit needs of communities in the commonwealth." At the end of the evaluation, the Division will assign the lender a descriptive rating: outstanding, high satisfactory, satisfactory, needs to improve or substantial noncompliance.

It seems clear that the primary thrust of the legislation was to place the Division of Banks in a position to monitor lending data more actively. The increased data available via public documents, as well as copies of 90-day notices and foreclosure auction data from lenders, will allow the Division to identify trends in loan defaults and cross-reference them in a variety of ways.

Fran Nolan is an attorney-director at the Harmon Law Offices in Newton. The firm represents creditors with respect to residential real estate default matters, including foreclosures. He can be e-mailed at fnolan@harmonlaw.com.

1st Circuit reverses Sudbury condo phasing case

Continued from page 6

ed — and still provides — the only way in which percentages may be set in Massachusetts. Second, the addition of Section 5(b)(1) did not alter the provisions of Section 5(a). Third, if the District Court decision had not been reversed, it would have called into question titles to hundreds, if not thousands, of units which had been created in phased condominiums.

My colleague, Christopher Marino, and I filed an amicus curiae brief on behalf of the Real Estate Bar Association and The Abstract Club, urging that the 1st Circuit vacate the judgment to the extent that it held that Section 5(b)(1) of Chapter 183A requires a condominium declarant, at the time it records the master deed, to precisely identify how each unit's percentage interest will change when each new phase is added to the condominium.

Under the District Court's interpretation of the statute, the developer would have to precisely predict the market values — and the percentages — of all the units in all phases several years down the road. This simply cannot be done with any degree of accuracy. When a real estate appraiser produces an appraisal report, the appraiser's value conclusion is always expressed as an approximation.

For example, a value conclusion might be "$1.2," not "$1,273,459.28." The appraiser and the lender for whom the appraisal is made understand that no such precision is possible. The language of Section 5(a), "such percentage shall be in the *approximate relation* that the fair value of the unit on the date of the master deed bears to the then aggregate fair value of all the units," is the very antithesis of the District Court's requirement that the master deed at the outset of the project state *precisely* what the percentage of each unit will be in all phases when the condominium is completed. As an example of the need for flexibility, a developer of a phased condominium may begin to build one-bedroom apartments in the first few phases, only to discover as marketing proceeds that there is a market for two-bedroom apartments, not-one bedroom units.

Under the District Court decision, this flexibility — which is particularly important with respect to condominium projects that will be built out over a period of years — would be impossible.

Fortunately, the 1st Circuit overruled the District Court's decision, as we had urged in our brief, preserving for our clients the flexibility they need to develop phased condominiums.

Enforceability of prepayment premiums in Mass.

Continued from page 4

prepayment premium provisions. Conversely, in insolvency cases, courts take into account equitable considerations such as the benefit or detriment to other creditors, even if those considerations conflict with the specific terms of a contract. See *In re Skyler Ridge*, 80 B.R. 500, 512 (Bankr. C.D. Cal. 1987). Accordingly, prepayment premiums are likely to be enforced against solvent debtors significantly more often than in cases involving insolvent parties.

Prepayment premium formulas

The formula used to arrive at a prepayment premium also affects the enforceability of the premium. There are several formulas commonly used, some requiring a fixed fee based on the amount of the loan still outstanding at the time of the prepayment, others using a sliding scale percentage fee depending on when the prepayment occurs, and still others, known as yield maintenance premiums, comparing the contract interest rate with the market rate to arrive at a premium fee.

Yield maintenance premiums are the preferred prepayment premium formula for long-term, fixed rate lenders because, by assessing the losses using market interest rates and discounting lost interest to present value, these provisions more closely estimate the actual losses a lender will incur than other prepayment formulas. *In re Vanderveer Estate Holdings, Inc.*, 283 B.R. 122, 132 (Bankr. E.D.N.Y. 2002).

Courts, however, have both allowed and disallowed all varieties of prepayment premiums, and no formula has proven to be the perfect calculation of a lender's losses.

Conclusion

Whether a prepayment premium will be upheld in court, therefore, hinges primarily on the facts of a particular case. Factors to consider regarding enforceability include whether the prepayment premium is assessed after a voluntary or involuntary prepayment; whether the enforcement of the prepayment premium arises in a bankruptcy proceeding, and, if so, whether the debtor is solvent or insolvent; and what kind of formula was used to calculate the premium.

Send a letter to the editor!

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www.reba.net

ALTA approves revised closing protection letters

Continued from page 9

consent of the title insurer; or

F. Any matters created, suffered, assumed or agreed to by the addressee or known to the addressee.

There are other conditions as well. In cases where an approved attorney (as opposed to an issuing agent) is conducting the closing, a title binder or commitment for a policy from the title insurer that issued the CPL must be received by the addressee prior to the time when the final closing instructions are given to the approved attorney.

In addition, the CPL emphasizes that the agent referred to in the letter is the title insurer's agent only for the limited purpose of issuing title insurance policies, and is not the insurer's agent for the purpose of providing other closing or settlement services. Therefore, the title insurer's liability for losses arising out of any of these other services is limited to protection expressly provided in the CPL.

The CPL also contains subrogation provisions, a direction regarding when and where a notice of claim should be sent, and a paragraph regarding the ability of both the insurer and the addressee of the letter to have a claim arising under the CPL submitted to arbitration.

Other limitations on the liability of the title insurer under the CPL depend upon which of the three newly approved forms the addressee receives. The basic CPL form is titled the "ALTA Closing Protection Letter," and it is the provisions of that form that have been discussed at length in this article.

The other two forms contain provisions that are very similar to those referred to above, but contain important additional limitations on liability. The form titled "ALTA Closing Protection Letter — Limitations" resembles the basic ALTA Closing Protection Letter, but contains an important limitation on liability in the "Conditions and Exclusions" section of the CPL. That additional paragraph states:

"The protection herein offered shall not extend to any transaction in which the funds you (the addressee) transmit to the Issuing Agent or Approved Attorney exceed $_____ …"

The paragraph then continues by stating that if the lender or other addressee wants protection to extend to a transaction where the funds transmitted to the agent will be more than the amount referred to above, the addressee should contact the title insurer. The paragraph's final sentence states that the paragraph will not apply to individual mortgage loan transactions on individual one- to four-family residential properties, including townhouse, condominium and cooperative apartment units. In other words, this limitation does not apply to most residential transactions.

The third form is titled "Closing Protection Letter — Single Transaction Limited Liability" and protects against loss in connection with the closing of a single real estate transaction. There is also an additional limitation on the insurer's liability because the protection under the CPL is conditioned upon the funds transmitted by the addressee to the agent not exceeding a particular amount.

Conclusion

There are three new Closing Protection Forms that have been approved by the American Land Title Association: the ALTA Closing Protection Letter, which offers the broadest protection against loss caused by an agent of the title insurer; the ALTA Closing Protection Letter — Limitations, which offers similar protection, but also contains a condition stating that the protection under the letter is not provided where the funds transmitted by the lender (or other addressee) to the title insurer's agent exceed a certain amount; and the Closing Protection Letter — Single Transaction Limited Liability, which further limits the liability to cases involving a single transaction, so long as the funds transmitted to the agent do not exceed a specified amount.

Each form may be viewed on the ALTA website, www.alta.org, under Forms and Standards. The CPL forms appear under the heading "Recently Adopted or Revised Forms Effective 1/1/08."

The CPL forms obligate the title insurer to reimburse the closing protection letter's addressee (usually a lender, but the addressee may also be a purchaser or a lessee of the property) for actual loss incurred in connection with a closing conducted by the title insurer's agent. The loss may result because of the agent's failure to follow closing instructions, the failure to obtain required documents or because there is fraud, dishonesty or negligence in the agent's handling of funds or documents in connection with the closing.

The new forms clarify what has traditionally been the liability of the title insurer under any CPL: that the liability arises only to the extent that the closing instructions and/or the agent's fraudulent or negligent conduct affects either the status of title or the validity, enforceability and priority of a mortgage that is to be insured by the title insurer obligated under the CPL.

The CPL forms also make it clear that the title insurer is not liable for loss resulting from certain matters beyond its control and for loss created or agreed to by the lender or other addressee.

Furthermore, the protection offered by the CPL does not extend to cases where the loss is caused by the fraud, dishonesty or negligence of the addressee's employee, attorney, broker or agent, or by the fraud or bad faith of any party other than the issuing agent or approved attorney referred to in the CPL.

REBA proposes Homestead reform legislation

Culminating a three-year effort, the Real Estate Bar Association's Legislation Committee has proposed comprehensive legislation to reform the Massachusetts Homestead Statute, G.L.c. 188.

"The Homestead law has needed a comprehensive overhaul for many years," said E. Christopher Kehoe, co-chair of the committee.

"This will bring clarification and certainty to this area of the law, particularly in light of recent Bankruptcy Court decisions," added principal draftsman Michael J. Goldberg.

To view an executive summary of the proposed legislation, log on to www.reba.net/documents/summary.pdf, and to view a copy of the bill itself, log on to www.reba.net/documents/Homestead.pdf.

ALTA approves revised closing protection letters

Continued from page 9

consent of the title insurer; or

F. Any matters created, suffered, assumed or agreed to by the addressee or known to the addressee.

There are other conditions as well. In cases where an approved attorney (as opposed to an issuing agent) is conducting the closing, a title binder or commitment for a policy from the title insurer that issued the CPL must be received by the addressee prior to the time when the final closing instructions are given to the approved attorney.

In addition, the CPL emphasizes that the agent referred to in the letter is the title insurer's agent only for the limited purpose of issuing title insurance policies, and is not the insurer's agent for the purpose of providing other closing or settlement services. Therefore, the title insurer's liability for losses arising out of any of these other services is limited to protection expressly provided in the CPL.

The CPL also contains subrogation provisions, a direction regarding when and where a notice of claim should be sent, and a paragraph regarding the ability of both the insurer and the addressee of the letter to have a claim arising under the CPL submitted to arbitration.

Other limitations on the liability of the title insurer under the CPL depend upon which of the three newly approved forms the addressee receives. The basic CPL form is titled the "ALTA Closing Protection Letter," and it is the provisions of that form that have been discussed at length in this article.

The other two forms contain provisions that are very similar to those referred to above, but contain important additional limitations on liability. The form titled "ALTA Closing Protection Letter — Limitations" resembles the basic ALTA Closing Protection Letter, but contains an important limitation on liability in the "Conditions and Exclusions" section of the CPL. That additional paragraph states:

"The protection herein offered shall not extend to any transaction in which the funds you (the addressee) transmit to the Issuing Agent or Approved Attorney exceed $_____ …"

The paragraph then continues by stating that if the lender or other addressee wants protection to extend to a transaction where the funds transmitted to the agent will be more than the amount referred to above, the addressee should contact the title insurer. The paragraph's final sentence states that the paragraph will not apply to individual mortgage loan transactions on individual one- to four-family residential properties, including townhouse, condominium and cooperative apartment units. In other words, this limitation does not apply to most residential transactions.

The third form is titled "Closing Protection Letter — Single Transaction Limited Liability" and protects against loss in connection with the closing of a single real estate transaction. There is also an additional limitation on the insurer's liability because the protection under the CPL is conditioned upon the funds transmitted by the addressee to the agent not exceeding a particular amount.

Conclusion

There are three new Closing Protection Forms that have been approved by the American Land Title Association: the ALTA Closing Protection Letter, which offers the broadest protection against loss caused by an agent of the title insurer; the ALTA Closing Protection Letter — Limitations, which offers similar protection, but also contains a condition stating that the protection under the letter is not provided where the funds transmitted by the lender (or other addressee) to the title insurer's agent exceed a certain amount; and the Closing Protection Letter — Single Transaction Limited Liability, which further limits the liability to cases involving a single transaction, so long as the funds transmitted to the agent do not exceed a specified amount.

Each form may be viewed on the ALTA website, www.alta.org, under Forms and Standards. The CPL forms appear under the heading "Recently Adopted or Revised Forms Effective 1/1/08."

The CPL forms obligate the title insurer to reimburse the closing protection letter's addressee (usually a lender, but the addressee may also be a purchaser or a lessee of the property) for actual loss incurred in connection with a closing conducted by the title insurer's agent. The loss may result because of the agent's failure to follow closing instructions, the failure to obtain required documents or because there is fraud, dishonesty or negligence in the agent's handling of funds or documents in connection with the closing.

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Catching up on indexing standards

Continued from page 7

ernmental entities.

The ban on two-sided documents will be more vigorously enforced. Although our scanners are near state of the art, nothing slows down the process or invites errors more than switching between simplex and duplex methods of scanning. The same is true for oversized pages such as condominium floor plans attached to deeds.

At first glance, the most onerous sounding standard is No. 7, which requires a three-by-three inch box in the upper-right corner of the first page of each document for the placement of recording data. Few documents recorded today would pass this test. For that reason, Standard No. 8 was included. This last rule requires each registry to adopt some method or procedure that would allow documents without the three-by-three box to still be recorded.

One method of doing this is through the use of a cover sheet that could be added as the first page of a non-complying document. This has been used successfully with more than 5,000 documents that have been recorded electronically at the Middlesex North Registry of Deeds during the past three years.

In an age in which words printed on paper have given way to the digital image for land records, the registry's ability to quickly, efficiently and reliably obtain an image of the document presented for recording is paramount. The new document formatting standards are intended to help accomplish this.

Questions or comments about the new standards should be directed to Richard P. Howe Jr., register at the Middlesex North District Registry of Deeds, by e-mail at lowelldeeds@comcast.net.

Midterm observations: state should applaud progress

Continued from page 8

pair and reconstruction."

The same bill proposes $355 million for land conservation, $75 million for urban parkways and $213 million in spending on parks, harbor islands, hiking and biking trails, swimming pools, skating rinks and campgrounds.

It became necessary to raise the annual cap on state borrowing to facilitate the advancement of more capital projects, which the administration says can be taken on without overly burdening the hundreds of millions of dollars set aside every year in the state budget to pay off state debt.

Of special interest to lawyers has been the construction of regional justice centers, or multi-department courthouses, in Worcester and Plymouth.

Similar facilities will also be built in Fall River, Salem, Taunton and Lowell and will replace aged and outdated courthouses that are too costly to maintain and not at all suited to the needs of the public in the 21st century.

Conveyancers in particular are pleased to see new facilities for the Registries of Deeds in Lawrence and Worcester. A new facility was also scheduled to open in Salem.

These projects are the latest in modernizing the storage and accessibility of land records in Massachusetts.

Secretary of State William Galvin and the Massachusetts Association of Registers of Deeds and Assistant Registers of Deeds are to be commended for embracing technology opportunities that have improved registry services to the public in the last several years.

REBA Annual Meeting & Conference

Continued on page 20

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REBA SPRING CONFERENCE

MARK YOUR CALENDAR!

Monday, May 5, 2008, at the DCU Center in Worcester

Bobrowski, Laurence join REBA Dispute Resolution

Continued from page 1

was a partner in the Boston law firm of Choate, Hall & Stewart with a practice concentrating in banking, antitrust, health care, environmental litigation and administrative proceedings.

He also represented bondholders of independent public authorities in litigation and financings and served on the American Arbitration Association's commercial panel of arbitrators in Boston.

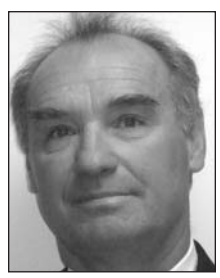
"We could not be more pleased that retired Judge Laurence will join our growing program," said REBA/DR President Robert J. Hoffman. "His considerable experience on the appellate bench will be a great asset to our clients."

Admitted to the federal and state bars in Maine, New York and Massachusetts, Laurence is a member of the Boston and Massachusetts bar associations, the American Law Institute and the American Judicature Society.

Laurence has been an adjunct professor at Northeastern University School of Law and has authored numerous articles and professional treatises, particularly in the areas of legal malpractice, the ethical practice of law, and the public trust doctrine.

"Retired Judge Laurence will bring greater depth to our panel, particularly for business and regulatory issues, and offer more options for our dispute resolution clients," said REBA Executive Director Peter Wittenborg.

Laurence is a 1958 graduate of Harvard College, magna cum laude, and a 1962 graduate of Harvard University School of Law, cum laude. He also holds degrees from the London School of Economics and Political Science as a Fulbright fellow, and Oxford University.



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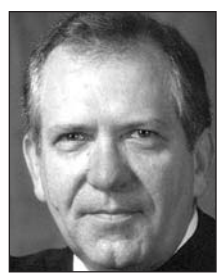

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About REBA Dispute Resolution

Founded in 1995 to meet the alternative dispute resolution needs of the business and real estate communities, REBA Dispute Resolution's more than 20 neutral mediators offer a full range of dispute resolution services, including mediation, arbitration, conciliation, mini-trial, summary jury trial, case evaluation and dispute intervener services.

REBA/DR is an approved provider of court-connected dispute resolution services in the Superior Court, Housing Court and Land Court.

For more information on REBA/DR and the Real Estate Bar Association, log on to www.reba.net.

REBA Annual Meeting & Conference

Continued from page 17