REBA NEWS

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The Newsletter of the
Real Estate Bar Association for Massachusetts

Sen. Cynthia S. Creem, D-Newton, chair of the Legislature's Joint Committee on the Judiciary, attended the May meeting of the REBA Legislation Committee. From left: Michael J. Goldberg, REBA Legislation Committee co-chair; Sen. Cynthia S. Creem; and REBA President Stephen M. Edwards

Roundup of REBA-proposed legislation

By Edward J. Smith

Legislation filed by REBA this session includes measures to improve the recording system and otherwise simplify and/or make uniform certain conveyancing practices.

H.994 has been proposed by Ward Graham of the REBA Legislation Committee to make technical improvements and corrections to Chapter 63 of the Acts of 2006, omnibus legislation that provided needed remedies to consumers for clearing title after payoff of mortgages. Provisions of H.994 would:

- incorporate the "off-record successor mortgagee" concept, which is needed to make provisions in St. 2006, c. 63 (i.e. discharge by affidavit, notice to interested parties and penalties) work in practice when the record mortgagee is defunct but has merged into or become a successor entity that can be readily identified and located by reference to other documents of record (outside the chain of title) or to governmental or quasi-governmental databases;
- clarify provisions intended to authorize a variety of individuals having apparent authority to execute documents on behalf of a mortgage holder or servicer, including when acting on behalf of

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SMITH

For over 20 years, Ed Smith has served as legislative counsel to REBA and its predecessor, the Massachusetts Conveyancers Association, representing the interests of transactional lawyers and conveyancers on Beacon Hill. He practices in Boston. Ed can be contacted by e-mail at ejs@ejsmithrelaw.com.

REBA-sponsored research examines home mortgage closing costs

By Michael A. Kemp

There is a long history of arguments in state legislatures and in state and federal courts about who should be permitted to provide mortgage settlement services; more specifically, about how governmental regulation concerning settlement service provision may affect the closing costs charged to borrowers.

The Federal Trade Commission and the U.S. Department of Justice have participated in these debates through, for example, amicus curiae submissions, letters to state legislators and Congressional testimony.

For example, in New England the agencies sent a joint letter in 2002 to the leaders and members of the Judiciary Committee of the Rhode Island House of Representatives when a bill (H.7462) to amend the definition of the "practice of law" with respect to real estate closings was under consideration. Similarly, in Massachusetts in 2004, the agencies prepared a letter in support of Rep. Paul Kujawski's bill no. 180 seeking to authorize non-attorneys to provide certain real estate settlement services.

In these submissions, the agencies typically argue that, consistent with general competition theory and the FTC's broader analysis of professional licensing practices, restricting settle-

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KEMP

A senior consultant to CRA International, Michael Kemp is the principal author of a definitive study comparing the cost of lawyer and non-lawyer closings across the country, including Massachusetts. "State Regulation of Home Mortgage Settlements: Some Empirical Evidence about Costs" is the first major analysis of this subject since the 1970s. Kemp is senior consultant to CRA International, a global economics and management consulting firm headquartered in Boston. Kemp previously served as vice president and director of survey research for the firm. He can be reached at mkemp@crai.com.

What's in this issue...

A Supplement to Massachusetts Lawyers Weekly

Short sales – pitfalls and strategies

GAGNON

By Michael A. Gagnon

Introduction

In addition to a predictable rise in foreclosures, the lending crisis and consequent economic malaise has engendered a rise in short sale transactions. Ultimately, these short sales are simply another strategy that lenders can employ to manage losses in non-performing assets, and in concept, at least, they are straightforward. However, in my work as an underwriter, I have found that short sales have become increasingly problematic for even the cautious conveyancer and potentially disastrous for the uninformed or reckless.

On its most basic level, a short sale is simply a transaction wherein a lender accepts less than it is owed as full payment of its note, then discharges the mortgage securing the seller's real estate. As a practical matter, short sales have been a part of conveyancing for as long as there have been mortgages. Historically, the short sale was negotiated by and between the lender and the seller, or possibly, the seller's attorney. When handled properly, it was an effective way to manage a distressed property.

Mike Gagnon is vice president and Massachusetts state counsel at Old Republic National Title Insurance Company. A frequent speaker and lecturer on title issues, he serves on REBA's Title Insurance & National Affairs Committee. He is also a husband, father, and avid — if unskilled — golfer. Mike can be reached by e-mail at mgagnon@oldrepublictitle.com.

The issue

The problem is that in recent months there has been a proliferation of these transactions commensurate with the rise in general distressed realty. Concomitant with this increase we've seen an influx of entities whose purpose is to realize a profit where there is precious little profit available and, more problematically, with little apparent attention to the rights of the parties. That dynamic is at the core of the problem. No one will ever object when a white knight initiates a negotiation whose purpose is to manage a distressed property equitably. However, any such transaction must be done in a fashion wherein no party to the transaction can subsequently claim to have been misled or defrauded.

Goals

In light of the foregoing, the purpose of this article is threefold: (1) to describe the short sale transaction as it is happening in our industry today; (2) to highlight the pitfalls which most commonly attend these transactions; and (3) to provide some strategies which the conveyancer can employ to protect their clients and themselves in the prosecution of short sales.

The pitfalls

Generally, the bulk of the problems presented in managing short sale transactions are derived from two sources: a failure to define and document the respective parties' rights; and a failure to recognize and/or prevent fraud and misrepresentation or fact patterns which could reasonably lead to viable claims of fraud and misrepresentation.

The short sale flip

The short sale flip is by far the most problematic version of short sale. It is, on its most basic level, a transaction where-

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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

By Stephen M. Edwards

My daughter just graduated from high school, and we had a cookout in our back yard for a bunch of her classmates. My mother, visiting from Arizona for the festivities, wistfully enjoyed watching the hubbub from our back porch, remembering when I was a high schooler and when she herself was one, too.

Time and change are happening to us all, and to the social and business environment in which we live and practice law. Law, business and society are ever dynamic, in ways that we can predict and in some we cannot.

The dynamics of the economy is a case in point. There are reports of stability and fluidity beginning to establish themselves, and some activity is picking up in some quarters, but systemic challenges remain that may affect the onset, extent and length of a recovery in ways we cannot predict.

National and international economic developments are affecting financing and transactional activity on a local level. Right now the finance markets are affecting different quarters of the local real estate economy and our practices differently. Some types of financing activity and transactions are seeing movement, some are not, and it will be an interesting remainder of 2009 to see how these developments unfold and how they affect our practices.

So, too, have developments in the increasingly national and international, and securitized and digitized, business of finance been affecting how real estate financing transactions are structured and conducted locally. The business environment in which we conduct our practices looks quite a bit different than it did 10 or 20 years ago, or even two years ago. And the fruit of these developments has not all been good — some of it has been very bad, for the economy, for consumers, for businesses and for lawyers.

Important fundamentals to the integrity of real estate transactions have been at risk of being thrown out with the bathwater in the midst of these marketplace developments. An important component of REBA's work has for some time now included fighting against the trend of processing transactions that transfer core legal rights to property in Massachusetts without the professional review, oversight and accountability of a lawyer, in the hopes of ensuring that each transaction is conducted properly and in accordance with the many laws and regulations that apply.

That fight has most recently been carried on in REBA's litigation in federal court. It was a surprise and a disappointment to receive the April ruling of the federal district court in favor of the defendant settlement services company in REBA's litigation to enforce the Massachusetts unauthorized practice of law statute. Having been dealt this setback, REBA is nonetheless as committed as ever to carrying forward our fight on behalf of the lawyers across Massachusetts who practice law in the transactional context.

REBA's mission is to support all of us whose law practices involve real estate matters. REBA provides us with resources, opportunities and a voice that we would not have on our own. This UPL fight is part of that mission, as is the work of our dedicated topical and working committees who provide us with timely information and programs on current developments affecting our clients' transactions and our practices across a broad spectrum of legal areas and the wider practice and transactional environment.

I am growing to appreciate more with each day that in times like these, when things are particularly challenging, REBA's importance and value as an active, engaged bar association, working to keep us informed, prepared and supported for what is happening now and what may be in the works, has never been clearer.

So even if the weather is iffy, if one of us brings the burgers, another the franks and another the potato salad, the summer is still better spent together. It's time to fire up the grill.

Steve Edwards is counsel in the real estate practice group of WilmerHale in Boston, where he focuses on commercial conveyancing and retail development. He has represented clients in a broad range of local and national commercial real estate matters including acquisitions and sales, leasing, development, financing and construction. Steve authored the chapter on leases and tenancies in MCLE's Crocker's Notes on Common Forms. From 1987 to 1990, he served as a lieutenant in the U.S. Navy Chaplain Corps with the Fleet Marine Force of the U.S. Marine Corps. Steve can be reached by e-mail at Stephen.edwards@wilmerhale.com.

The Legislature looks at condominiums and cooperatives

By Edward J. Smith

Condominiums and cooperatives have been the subject of a number of legislative measures that have put into debate the very nature of these entities, specifically the flexibility that courts have cited as a singular benefit of these forms of community home ownership. Although the cooperative form of community home ownership is less popular in the commonwealth, a great deal of attention has been drawn to one bill that, in general, would limit the eligibility criteria for persons seeking to become cooperative shareholders, so that only the applicant's financial wherewithal would be considered.

What began as the subject of private litigation, relative to eligibility for buying into a particular cooperative on Beacon Street, has become a controversial measure that would limit the flexibility currently enjoyed by cooperative boards in the selection of new residents. Cooperatives formed for seniors, artists and other communities of interest, including so-called limited equity co-ops that promote affordability for residents, have been particularly vocal in their opposition. Legislation was sent to the governor twice last term before it was ultimately vetoed. See Veto Message, H.5070 of 2008.

This session, proponents have filed a version, H.3686 of 2009, which they tout as a compromise negotiated with the governor's chief legal counsel. It allows for standards for eligibility to become a shareholder in a co-op, "provided that such standards reasonably relate to: (i) the capacity to satisfy the stockholder's financial and maintenance obligations with respect to the property; (ii) the creation of the housing cooperative as a community of interest, provided however, that a detailed statement of the communal purpose and eligibility standards of the community of interest shall be contained within the articles of organization of the corporation; and/or (iii) standards as a provider of affordable housing . . . "

Proponents argue that a selection process should be subject to legal redress, even if not based on race, creed, color, national origin, sex or sexual orientation. Opponents fear that decision-making relative to eligibility will too readily be vulnerable to litigation. Does this create a new class of plaintiffs seeking to vindicate a wrong? The fact that housing is the issue makes it a provocative one. Whatever the eventual outcome of the legislation, co-ops might be well-advised to include a detailed statement of a communal purpose and eligibility standards within their articles of organization, and any denial of a new resident's application should be specific as to which eligibility standards the shareholder applicant failed to meet.

Adjusting percentage interest for affordable units

Another test of the flexibility of a form of community home ownership arises in the every-day circumstance of market-rate and affordable units that may be present in the same (mixed-use) condominium. G.L.c. 183A, §5 has always required that the percentage interest of a condominium unit in the development's common areas and the unit's common expense assessment 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. This limitation has been

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Ed Smith serves as the association's legislative counsel and is a frequent contributor to the pages of REBA News. He practices law in Boston and can be reached by e-mail at ejs@ejsmithrelaw.com.

Are we dinosaurs?

By Paul F. Alphen

Do you listen to sports talk radio? Does it drive you crazy? Me too.

It was great to attend two Game 7s in a week, though the results were very disappointing and hard to reconcile. In their aftermath, I was listening to a talk radio discussion regarding the Celtics vs. Orlando Magic series and the show hosts were debating whether the NBA made a mistake when it adopted the three-point field goal in 1979. The hosts were hotly arguing whether the game of basketball had been ruined by the rule. They argued that there was something "pure" about the games that were played before the rules change.

Former REBA President Paul Alphen concentrates in residential and commercial real estate development and land use regulation law in Westford. A frequent contributor of commentary to the pages of REBA News, he can be reached by e-mail at paul@lawbas.com.

Who do they think constitutes their audience when they argue about things that happened in 1979? Attempting to explain to my 20-something sons that the rules were better in 1979 would be like me listening to stories about how great things were in the late 1940s. The old rules are irrelevant. Sure, there are always great lessons to be learned from history, but a 24-year-old can tolerate only modest doses of John Havlicek and Bill Russell stories.

At the Spring Conference in May we learned about the new data security laws. Under 201 CMR 17.00, every company is required to adopt a comprehensive written security program by Jan. 1, 2010. You will have to encrypt certain data in your Blackberry and iPhone, although nobody knows how. Old guys like me may find it easier to limit the use of our handheld devices so as to exclude personal data, but I suspect that younger people will have difficulty complying with the requirements. Will this create a generation of scofflaws who think that the old people are living in the past and creating rules that are simply irrelevant?

I just read an article in a law school magazine wherein young lawyers were bragging about all the legal business that they had generated through social networking tools such as Facebook and Twitter. Old guys generally do not use such tools because we are already overwhelmed by communication received via Fed-X, U.S. Mail, telephone, fax, voice-mail, e-mail, and text messages (required for communicating with college-age children). But before I would consider using tools such as Facebook I would have to figure out how to comply with the Rules of Professional Conduct (see Rule 7.3) and the new data security laws. Perhaps younger people feel that the rules were written before the invention of Facebook and that the old people who wrote them are living in the past.

Much has been written about the erosion of respect for the rule of law. Some say our generation, which questioned authority in the 1970s, was the catalyst for the eroding respect for the law. We can also prevent further erosion by respecting the rule of law and making it easier for our colleagues also to respect it.

A local conveyancer, a generation older than I, told me that during this economic slowdown he considered the option of performing refinance closings for an out-of-state closing company. He carefully read the many pages of fine print contained within the closing company's agreement. He concluded that the breadth of legal obligations to the closing company would be similar to the obligations owed to a local lender; however, if he performed closings for the closing company he would not see the title exam, nor the commitment letter or other documents that comprise the elements of the transaction. He would not be in a position to provide complete answers to the borrowers at the closing, and he could not be sure that the borrower could convey to the lender good and clear record and marketable title. He concluded that for a fee of under $200, the risk was not worth the reward.

Perhaps it is "old school" to read the fine print. Encourage your colleagues, young and not-so-young, to read the fine print and refer to the Rules of Professional Conduct. If you feel that the rules are outdated, confer with the Office of Bar Counsel or participate with your favorite bar association to discuss ways to create compliance with the rules. Treating them as irrelevant is not an option.

Health savings accounts for high-deductible health plans

By James J. Maimone

While the country and Congress wrestle with what ails our healthcare system, there are several things that you — as both an employer and employee — can do to help your firm and yourself take control of your own health. First, take better care of YOU. Employers that create healthy environments — exercise plans, smoking cessation plans — can see the benefits of slower growth in insurance premiums and reduced absenteeism, which may result in increased worker productivity. As employees, you will also benefit from lower premiums and a healthier lifestyle today that may lead to a better quality of life during retirement.

To help employers and employees focus on their individual health circumstances, the Bush Administration, the U.S. Congress and the Treasury created the Health Savings Account as part of the 2003 Medicare Modernization Act. As then-Treasury Secretary John Snow said at a White House briefing in 2005, "Americans are the best consumers in the world … we want to take the best consumers in the world and make them the best consumers of health care."

By creating an especially tax-favored account for individuals to save and pay for medical expenses under a high-deductible health plan, the federal government created a tax incentive to encourage individuals to take stock not only in their health, but in their health care.

Maura Troiano, of Gallagher Benefit Services Inc., suggests "high-deductible health plans can be 20 to 40 percent less expensive than traditional plans, and the tax-advantaged HSA funds can be used for healthcare expenses for now, or for future retiree healthcare costs." She adds, "As consumers, we need to ask more questions and look for different options, whether a person is managing a chronic illness or receiving just their annual check-up."

Employers should review their health insurance programs today to make sure they meet both their service and cost requirements. Considering an HDHP with an HSA program may save a firm and its employees a higher cost for premiums. Employers should also consider contributing to their employees' HSAs, since the contributions can be tax-deductible to the firm and help their employees transition to a new plan. In addition, get those wellness programs started!

Employees need to become better aware of their health care environment. Take advantage of employer wellness plans, get to know your health care provider and be involved in your treatment and become better consumers of healthcare.

At the end of the day, you alone may not cure the nation's health care illness, but by being a better consumer of health care, you will be doing yourself a world of good both physically and financially.

Jim Maimone is vice president and product manager for RBS Global Transaction Services, Americas, with responsibility for health savings accounts and electronic data interchange. Jim has over 15 years experience in cash management. He can be reached by e-mail at james.j.maimone@citizensbank.com.

REBA has recently joined with long-time affinity partner Citizens Bank to offer health savings accounts as a member benefit. For more information regarding health savings accounts visit www.citizensbankhsa.com. To enroll in the REBA-sponsored HSA plan, log onto www.reba.net to get your Citizens Bank HSA Plan ID.

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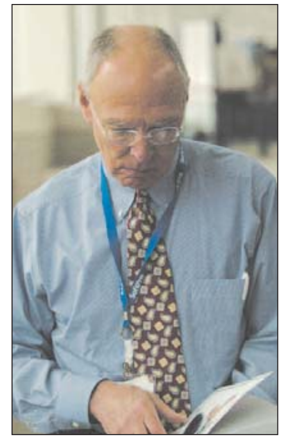


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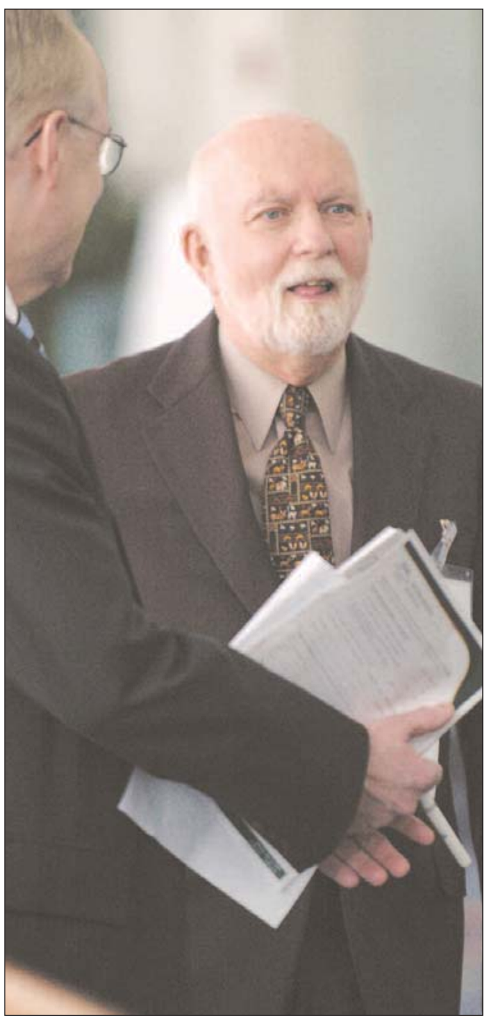


REBA

The Fair Debt Collection Practices Act: a caution for lawyers with ancillary collection practices

By John J. O'Connor

Do you represent lenders, finance companies, close corporations, or other businesses and consider yourself a real estate or business attorney? At the same time, do you assist your clients from time to time in the collection of consumer debt? If you do, notwithstanding your own conception of your practice, you may be a debt collector subject to regulation and liability under the federal Fair Debt Collection Practices Act ("FDCPA"). In addition to collection agencies and full-time collection counsel, the FDCPA can apply to attorneys who have ancillary but regular practices collecting consumer debt. If you are subject to the FDCPA, you have compliance obligations and exposure to liability for damages and attorneys fees. To assist you in evaluating whether the FDCPA could apply to you, a summary discussion of some statutory basics and caselaw follows.

The FDCPA, codified at 15 U.S.C. § 1692 et seq, is the most important federal legislation regulating the collection industry. Enacted in 1978, its purpose is to eliminate abusive, deceptive, and unfair practices in the collection of consumer debt. The statute does not apply to creditors collecting their own loans. Rather, it applies to defined "debt collectors", essentially collection agencies and collection attorneys.

The FDCPA restricts abusive collection practices and provides specific rights for debtors. For example, the statute gives the debtor the right to require a collector to stop contacting him/her; it requires collectors to deal only with a debtor's attorney; it gives debtors the right to require a collector to verify the existence and the amount of the debt; and it requires debt collectors in any event to notify debtors of: (1) so-called debt-validation rights (including the debt amount and the original creditor's name); and (2) that communications are from a debt collector and for the purpose of debt collection.

The FDCPA is a strict liability statute. It is no defense that violations were negligent or unintentional. Prevailing plaintiffs are entitled to actual damages, or to statutory damages of up to $1,000 per action where actual damages cannot be proved. Successful plaintiffs also are entitled to costs and reasonable attorneys' fees.

An attorney is a debt collector subject to the statute if his/her principal business is debt collection, or he/she "regularly collects or attempts to collect" debt owed or due another. Under this alternative definition, an attorney need not have a full-time collection practice to fall within the scope of the FDCPA. So long as there is collection activity that a court might deem "regular", the statute can apply. This is true even if the attorney's collection practice consists only of pure litigation activities such as prosecuting collection suits.

Whether an attorney's collection activity is "regular" has been considered by many courts around the country. Not surprisingly, the decisions are not uniform. Factors that courts have considered include: (1) the total volume of collection activity (e.g., collection letters issued/collection suits filed) engaged in by the attorney over a relevant period; (2) the amount of revenue derived by the attorney from collection work as a gross number, and/or the percentage of collection-related revenue over a relevant period; (3) the percentage of collection matters that the attorney has worked on over a relevant period; (4) the systems, employees, or contractors that the attorney has in place, if any, to assist in collection; (5) whether there is any pattern to the collection activity; (6) whether the business of the attorney's clients requires regular collection work; (7) whether the attorney markets collection services; (8) whether collection is a "substantial" part of the attorney's practice; (9) whether the attorney also represents debtors; and (10) whether the attorney maintains any professional affiliations or memberships related to debt collection. Resolution of the issue is highly fact specific.

Attorneys concerned about potential FDCPA exposure would do well to review the statute and the local decisions regarding debt collector status.

Neither the First Circuit not the District Court in Massachusetts has adopted a particular standard or test for determining when collection activity is regular. The District Court has acknowledged a number of the factors listed above, and has granted summary judgment to attorneys in two cases. In one, the defendant attorney swore that no more than 0.4% of his firm's practice involved the collection of consumer debt. In the other case, the defendant attorneys swore that only about 4.5 % of the firm's work was consumer debt collection. In both cases, the plaintiffs submitted no evidence of any kind to contradict the defendants' affidavits. These authorities are reassuring to the extent that your collection practice may be similar to, or more modest than, the practices of the attorneys in these cases, but they do not exclude the possibility that better informed/prepared plaintiffs would have been able to avoid summary judgment, and they say little about how the court will view closer cases.

In sum, it is safe to assume that an attorney who sends out an occasional dunning letter or files an isolated collection suit is not an FDCPA debt collector. By the same token, an attorney who spends 50% of his/her time on collection of consumer debt is clearly covered by the statute. The cases on the margins are easy to categorize. What is more difficult is predicting where a court will draw the line in a case in which reasonable minds can differ. That uncertainty is problematic for the practitioner with an ancillary collection practice, as an aggrieved consumer may well be able to state an FDCPA claim. Attorneys concerned about potential FDCPA exposure would do well to review the statute and the local decisions regarding debt collector status.

Jack O'Connor, is a partner in Boston-based Peabody & Arnold's litigation department. He regularly represents attorneys and collection professionals in FDCPA and related matters. Jack can be reached by e-mail at joconnor@peabodyarnold.com.

Does new mortgage-originator licensing legislation exempt attorneys?

By Edward J. Smith

The Massachusetts Division of Banks has urged passage of legislation to insure that state law is not pre-empted by federal law that would shift oversight of non-bank mortgage loan originators to the U.S. Department of Housing and Urban Development.

According to Commissioner of Banks Steven Antonakes, the state needs to adopt changes to its statutes governing mortgage loan originators by July 31 or lose authority to the federal government.

At a May 6 State House hearing of the Joint Committee on Financial Services on S. 452 and H. 980, Antonakes lauded 2007 state legislation that created one of the nation's "strongest regulatory structures" for non-bank lenders and brokers, but said that the state needed to bring itself into compliance with a federal law passed last year.

Antonakes headed up an effort on behalf of the Conference of State Bank Supervisors to draft model state legislation. He testified at an April Congressional hearing on H.R. 1728, The Mortgage Reform and Anti-Predatory Lending Act of 2009. According to the CSBS press release that appears on the DOB website, Antonakes "urged Congress to ensure that states continue to play a major role in mortgage supervision and enforcement. The model legislation, which has already passed in 25 other states, includes certain exemptions from the originator licensing regime of the state regulator. The exemption language, drafted by HUD, carves out: (a) any registered mortgage loan originator; (b) any individual who offers or negotiates terms of a residential mortgage loan with or on behalf of an immediate family member of the individual; (c) any individual who offers or negotiates terms of a residential mortgage loan secured by a dwelling that served as the individual's residence, and (d) any licensed attorney who negotiates the terms of a residential mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client, unless the attorney is compensated by a lender, a mortgage broker, or other mortgage loan originator or by any agent of such lender, mortgage broker, or other mortgage loan originator.

Attorneys will be subject to the licensing provisions if he or she negotiates the terms of a residential mortgage loan on behalf of a client.

In summary, attorneys will be subject to the licensing provisions if he or she negotiates the terms of a residential mortgage loan on behalf of a client, even if ancillary to the attorney's representation of the client, if the attorney is compensated by a lender, mortgage broker or other mortgage loan originator or by any agent of such lender, mortgage broker or other mortgage loan originator.

DOB staff has said that the intent is not to cover what attorneys do in the normal rendering of legal services to either a lender client or a borrower client, even if a lender pays a borrower's losing costs. However, if an attorney does any more than refer a client to an originator for the negotiation of the loan terms, the attorney may run the risk of being considered an "originator" for the purpose of licensure, if the lender paid all closing costs.

Ed Smith is a Boston attorney and REBA's legislative counsel. He can be reached by e-mail at ejs@ejsmithrelaw.com.

Defense counsel's repair efforts can sometimes avoid a malpractice suit


WEINER


MARKOWSKI

By Harvey Weiner and Jennifer L. Markowski

In our legal malpractice defense practice we are sometimes able to make repair efforts that avoid a legal malpractice lawsuit from being filed against our clients. Such was the situation in the case of *North Shore Bank v. Jeffrey Ludwig*, Land Court C.A. No. MISC-06-326502, a case that Massachusetts Lawyers Weekly reported as one of the most important decisions of 2008.

In August 2001, Jeffrey Ludwig purchased a single family home in Groveland, Massachusetts with financing from North Shore Bank. Ludwig intended for the property to be transferred to himself as trustee of the M Double B Realty Trust. The trust documents were prepared and recorded with the Registry of Deeds along with a trust certificate that indicated the trust was to own the property and would be granting mortgages to the bank. Based on the understanding that the trust would own the property, the bank agreed to loan the trust $325,000.

Our attorney client closed the loan for the bank. Every closing document except the deed indicated that Jeffrey Ludwig, as trustee of the M Double B Realty Trust, was purchasing the property. However, the deed, which was apparently delivered directly to the registry after the closing, was recorded without the language, "Trustee of the M Double B Realty Trust" after the words "Jeffrey Ludwig" as grantee.

Ludwig was first informed of the error on the deed when he was considering filing for bankruptcy. He consulted with a bankruptcy attorney who, after reviewing the closing documents, allegedly advised him that a bankruptcy trustee would likely take the position that he personally owned the property "free and clear" of any encumbrances, which might prohibit him from filing for bankruptcy.

Although Ludwig had accepted and used the bank loan proceeds and had believed that the bank had mortgages on his property, he, upon learning of the deed problem, placed a homestead on the property, conveyed the property to himself and his mother as joint tenants for stated consideration of $10, and set out to secure financing from other lenders.

He obtained two loans from another lender in the total amount of $505,000. The new lender's closing attorney obtained a title examination report, which identified each of the bank mortgages and which stated that the property was "subject to" those mortgages. Although the new lender's attorney recognized the scrivener's error, which later in deposition testimony was characterized by the title examiner as "catastrophic," he concluded that the property was not subject to the bank mortgages. Thus, he proceeded with the closing without notifying the bank or our client about the subsequent mortgage and did not pay off the bank mortgages with the loan proceeds.

Ludwig and his mother refinanced the property on several occasions. Each of the subsequent lenders used the same closing attorney to close their loans. Once again, the closing attorney did not notify the bank of the subsequent closings and did not pay off any of its mortgages. When all was said and done, Ludwig had $600,000 in outstanding mortgages on the property from subsequent lenders, not including the original mortgages from the bank for $325,000. The total amount of encumbrances on the property significantly exceeded the value of the property even prior to the present economic downturn.

The bank discovered the error when the subsequent lenders resisted its attempt to foreclose on the property and claimed their mortgages had priority. Not surprisingly, the bank looked to its closing attorney, our client, to account for the problem.

We were retained by the malpractice insurer shortly after the bank discovered the error. As part of our initial investigation we looked at the documents on file at the registry just as the closing attorney for the subsequent lenders or his title examiner would have done. It was immediately apparent to us that a search of the grantor/grantee index for "Ludwig" or "Jeffrey Ludwig" revealed the bank mort-

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Restructuring a Massachusetts corporate trust after Chapter 173 of the Acts of 2008

By Stuart T. Freeland

In the past a significant number of Massachusetts businesses have been organized as corporate trusts because of the favorable manner in which these trusts were taxed by the commonwealth. Although many of these trusts were (and are) taxed as corporations under the Internal Revenue Code and therefore subject to the unfavorable provisions of the code governing the taxation of corporations, prior to Jan. 1, 2009, the effective date of Chapter 173 of the Acts of 2008, corporate trusts organized under Chapter 182 of the Massachusetts General Laws received the more favorable tax treatment available to individuals.

As a result of this act, corporate trusts will be treated as the same form of entity for Massachusetts income tax purposes as they are for federal income tax purposes for taxable years commencing on or after Jan. 1, 2009, and many of them will be taxed as corporations.

Corporate trusts that were relevant for federal income tax purposes prior to Jan. 1, 1997, were generally taxed as corporations under then-existing treasury regulations governing the classification of entities. Effective Jan. 1, 1997, these regulations were revised so that a corporate trust organized after that date would be treated as an "eligible entity" that could elect to be taxed either as a partnership or a corporation. Trusts already in existence on that date and taxed as corporations retained that status and continue to be taxed as corporations. Therefore, for taxable years commencing after Jan. 1, 2009, corporate trusts will be treated either as a partnership or a corporation for Massachusetts tax purposes, depending on their federal classification.

Prior to 1971, corporate trusts were not subject to tax in Massachusetts unless they elected to be taxed, in which event they were taxed at the rates imposed on individuals and the dividends paid to shareholders were not taxed. A great many businesses were organized to take advantage of the combination of the favorable rates imposed on individuals and the absence of the two levels of tax imposed on corporations. Although many of these trusts were liquidated in contemplation of the 1986 revision to federal law that allowed corporations to avoid the tax at the corporate level in connection with a liquidation, a considerable number of these trusts continue to exist today.

Also, a significant number of corporate trusts were created as the result of Department of Revenue Letter Ruling 99-77, which advised that a company could avoid the Massachusetts tax imposed on large S corporations having gross income in excess of $6 million by restructuring as a qualified S corporation subsidiary ("Qsub") of a corporate trust that elected to be taxed as an S corporation and treat the former S corporation as a Qsub. The letter ruling stated that, because a corporate trust was not taxed as a corporation, it was not subject to the corporate level tax and, because the subsidiary was a disregarded entity in accordance with Technical Information Release 97-6, the income of the subsidiary would be included in the income of the parent trust free of the corporate level tax.

Because a corporate trust that is taxed as a corporation is now subject to the income measure of the Massachusetts Corporate Excise Tax, there is no longer any significant advantage in continuing to operate as a trust, and, because it is not clear that the trustees and shareholders of a corporate trust have limited liability, there is a potentially significant disadvantage in doing so. Therefore, owners of these trusts may wish to restructure them as corporations by means of an F reorganization that will enable a surviving corporation to preserve all of its tax attributes, including its S election, its taxable year and the ability to carry back net operating losses.

Owners wishing to restructure a corporate trust as a corporation should be aware of a proposed treasury regulation that, if and when published as a final regulation, will provide explicit guidance regarding the requirements for a transaction to qualify as an F reorganization. Under Prop. Reg. §1.368-2(m)(1)(i), an F reorganization must satisfy the following requirements: all of the stock of the resulting corporation, including stock issued before the transfer is issued in respect of the stock of the transferring corporation; there is no change in the ownership of the corporation in the transaction, except a change that has no effect other than that of a redemption of less than all of the shares of the transferring corporation; the transferring corporation completely liquidates in the transaction; and the resulting corporation does not hold any property or have any tax attributes (including those specified in section 381(c)) immediately before the transfer.

This regulation will affect transactions occurring on or after the date that they are published in the federal register; how-

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Defense counsel's repair efforts can sometimes avoid a malpractice suit

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gages and the trust documents. We could not conceive of how a title examiner would not have discovered the error and understood that the bank and Ludwig had intended to encumber the Groveland property with the bank's mortgages. What we did not know, and could not know until we conducted discovery, was the title examination of the subsequent lender had in fact revealed the problem.

We were confident that under these circumstances there was legal authority to support a claim to reform the deed to reflect the parties' intent and to declare the subsequent mortgages were subordinate to the bank's mortgages because the subsequent lenders had constructive, if not actual notice, of the intended grantee. Consequently, we sought and obtained approval from the obliging bank to file and pursue a complaint on its behalf seeking reformation and subordination. If we were successful, the bank could be made whole and would not need to pursue a legal malpractice lawsuit against its attorney.

We completed discovery and filed a motion for summary judgment, which the Land Court judge allowed, finding that the subsequent lenders had actual knowledge of the bank's mortgages because their attorney knew about the mortgages. As a result, the judge ordered the deed reformed and declared the subsequent mortgages subordinate. Because we were able to "repair" the error, the bank's closing attorney avoided a legal malpractice lawsuit and the bank ultimately received what it bargained for, namely, having its mortgages first priority. The entire situation involving not only the bank and its closing attorney but also the subsequent lenders and their closing attorney was ultimately settled.

Restructuring a Massachusetts corporate trust after Chapter 173 of the Acts of 2008

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ever, given the lack of clear and consistent authority regarding the requirements that must be satisfied to qualify a transaction as an F reorganization, it seems advisable to structure future transactions to satisfy the foregoing requirements.

A standalone corporate trust should have no difficulty satisfying these requirements either by merger or conversion. It will be more complicated to restructure a corporate trust that is a holding corporation for a Qsub because a downstream merger into Qsub cannot satisfy the limitation against holding property or having tax attributes. Therefore, it appears that an upstream merger of the Q sub into the parent corporate trust and the conversion of the trust to a corporation will be the appropriate transaction. Fortunately, Prop. Reg. §1 368-2(m)(3) seems to contemplate this transaction by allowing a series of related transactions that together result in a mere change in the form of one corporation to qualify as an F reorganization.

At the state level, the Massachusetts Department of Revenue has contemplated the foregoing transaction in Directive 04-1, which expressly acknowledges that an upstream merger of a Qsub with its parent corporate trust will qualify as an F reorganization in accordance with G.L.c. 62, §8A, provided that the transaction qualifies as an F reorganization under federal law. The trust could then be restructured as a corporation as described in the preceding paragraph. Although Directive 04-1 was issued in the context of a transaction that preceded the reclassification of a corporate trust as a corporation for Massachusetts tax purposes, the reclassification should not change this result.

The Legislature looks at condominiums and cooperatives

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shown to be unduly problematic for developers and associations.

When common expenses for all units are relatively low, assessment amounts that are not faithful to the letter of the statute can exist when no one complains. That becomes less possible when affordable units are greater than 20 percent of the total number of units in a project, as is often the case in Boston. Also, a market-rate unit can bear an undue share of expenses for maintenance when an affordable unit is similar in size or enjoys amenities that are similar to the market-rate unit.

Appellate courts have referred to the Massachusetts first-generation condominium statute as an enabling act that encourages flexibility, except where expressly constrained. Legislation to address inequitable outcomes in common expense assessments has been debated among the bar in recent years.

The time may have arrived, as two bills before the Joint Committee on Housing, S.628 and H.1235, propose that a master deed, when allocating common area percentage interests among units include: one, a determination of whether and how to weigh a restriction relating to value imposed on one or more, but fewer than all, units by covenant, agreement or otherwise, and further, that re-adjustment of one or more unit's percentage interest solely to reflect release or termination of a restriction previously imposed on the unit by covenant, agreement or otherwise that was a factor for reduction of that percentage interest, with proportionate adjustment only to each other unit's percentage interest, if not otherwise provided for in the master deed, may be made by vote of 75 percent or such other percentage of unit owners as is required to amend the master deed generally, whichever is less; two, an authorization of common expense assessments, either in accordance with the respective percentages of undivided interest in the common areas and facilities or, if stated in the master deed or an amendment thereto, in the approximate relation that the area of the unit bears to the aggregate area of all the units, which may take into account unit location, amenities in the unit and limited common areas and facilities benefiting the unit, provided that such an amendment shall require the consent of all unit owners whose common expense assessment is materially affected.

Other condominium governance

Other measures before the court would restrict or enlarge flexibility in the governance of condominiums. Variously, legislation would prescribe conduct of boards of trustees (H.1238-H.1241, H.3461) and create a condominium unit owners bill of rights (S.667). Municipality-inspired bills would relieve municipalities of the responsibility to pay condo fees on a unit after a tax taking and/or authorize municipalities to tax reserved phasing or development rights (H.104, §53; H.2822, H.2847, H.2848, H.3746)

Short sales – pitfalls and strategies

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in the short sale seller conveys to an intermediary who then sells to a third-party buyer. The transaction is made possible by the largesse of the short sale lender who has effectively consented to the sale by foregoing foreclosure and taking a loss on its security. It is for this reason that the conveyancer must ensure that the short sale lender is fully informed of all facts germane to the transaction, including the terms of the end sale in a flip. It is that disclosure, or lack of it that ultimately drives the viability of a short sale flip.

However, with the rise in the number of short sales has come a rise in abuses. Specifically, there are several short sale schemes in circulation whose apparent purpose is to mislead, or at least under-inform, the short sale lender. The basic format is as follows: An intermediary acting on behalf of the seller negotiates a short sale with the seller's lender ("short sale lender"). Either concomitant with that negotiation, or shortly thereafter, the intermediary negotiates a separate, independent sale to a third-party. The short sale transaction will consist of a deed from the short sale seller to the intermediary who is often an LLC or corporation. Then, often on the same day and sometimes immediately after the short sale, the intermediary will record its deed to the end-buyer and the end-buyer will record a mortgage to its lender ("end lender").

Disclosure cures defects

All of this is perfectly acceptable as long as the short sale lender is cognizant of and has authorized in writing as to the terms of the end deal. Unfortunately, this is the moment when these transactions begin their demise. What we often find is that the proceeds the intermediary realizes on the end deal are at least as much as and often significantly more than the short sale lender's shortfall. This intermediary has effectively appropriated what is arguably the short sale lender's payoff. Simply put, the deal doesn't make sense because the money doesn't make sense. However, balance is restored if the short sale lender was fully apprised of the separate negotiation with the end-buyer, and most importantly, understood the amount which the intermediary would realize in the end sale. If the short sale lender knows that its shortfall will be captured by the intermediary and has included that fact in its calculation, then we truly have a transaction wherein all parties are fully informed. Crucial for the conveyancer, such disclosure and acknowledgment by the short sale lender effectively bars any reasonable claim sounding in fraud that the short sale lender may subsequently attempt to assert.

Liability

As claims counsel in our office has reminded me on several occasions, conveyancers who are involved in such short sale transactions and who fail to procure and document the short sale lender's assent would most likely be named in the short sale lender's suit, possibly as conspirators. Further, such suits could reasonably be brought in the federal court system sounding in bank fraud, RICO and other potentially expensive federal claims carrying criminal as well as civil liability.

A final note on the subject: I would emphasize that the issues raised here are not simply academic. Short sale lenders have most definitely recognized the potential for fraud in these short sale flips and their concern is manifested in recent changes they have made to the terms of their short sale agreements. In recent months, lenders nationwide have begun to include clauses in their short sale payoff letters wherein they purport to reserve the right to set aside a short sale and reinstitute their note and mortgage when and if they suspect fraud in that short sale. Obviously such a tactic exercised by a short sale lender is potentially catastrophic for the end buyer, end lender, their title insurer and, of course, the conveyancer.

The short sale demand/estoppel (if only they'd call it a "payoff") letter

The next sets of concerns presented by the short sale are those created by the short sale payoff letter. These documents bear little resemblance to the payoff letter in a conventional transaction. As might be expected, they tend to be heavily weighted in favor of the short sale lender. The conveyancer's goal should be to bring the letter into line with a conventional payoff letter, or at least limit or delete the more noxious provisions therein. When done effectively, the closer has increased the likelihood of a fair and successful transaction and limited the possibility of post-closing objections by the short sale lender.

Reservations of rights clauses

As noted in the preceding section, short sale lenders have recently begun to include clauses in their letters that reserve to the lender the right to reinstitute its note and mortgage after the transaction is consummated, if it becomes cognizant of facts which suggest fraud. For reasons that do not need to be elaborated, these provisions should not be allowed to stand. Most title insurers have issued underwriting directives on this issue, and I'd encourage all conveyancers to check with their carriers for direction if they haven't done so already.

Whose letter is this?

One of the most striking things about the short sale payoff letter, at least to the uninitiated, is that it is not addressed to the conveyancer. Rather, it is usually addressed to the seller only. This is problematic in that it effectively relegates the settlement agent to the status of persona non grata, which makes initial communications with the lender difficult at best. Further, even though the conveyancer is not an addressee, these short sale letters impose certain obligations on the settlement agent, which, if not properly discharged, effectively terminate the short sale. For these reasons, the conveyancer should be recognized on the letter as the settlement agent. That said, I'm informed by my agents that they have had limited success on that point.

Make sure that a discharge is forthcoming

One issue that seems to recur consistently in these letters is the omission in the letter of a statement that the lender will in fact send a discharge on its receipt of the payoff. For obvious reasons, the conveyancer should confirm that the letter is revised to include the short sale lender's unequivocal obligation on that issue.

Short sale lender's conditional compliance — shortfall note:

Many of these letters put an affirmative obligation on the part of the settlement agent to procure a note in the amount of the shortfall from the seller. This is problematic initially because the conveyancer is probably not a party to the payoff letter. To the extent that the lender expects a note from the seller, the onus for providing same should be on the seller or the seller's representative. More important, though, are the ethical ramifications.

The short sale is by definition a transaction wherein the parties' interests are divergent if not actually contentious. In that context, the conveyancer's duty must be limited to her clients exclusively; her scope of representation is confined to the end lender and perhaps the end buyer, but most certainly does not extend to the short sale lender.

Consequently, that or any similar provision should be deleted or modified to relive the settlement agent of that obligation.

Negotiating short sales with servicers

As all conveyancers are painfully aware, whenever dealing with lenders in the distressed property context, most communications with lenders are with and through their servicers. Certainly in the case of foreclosure, we all spend a good deal of time insuring that the servicers who purport to act on behalf of the lenders only do so with proper authority. This consideration becomes especially important when the party with whom you are communicating is negotiating a transaction where its principal will suffer a loss.

Consequently, whenever dealing with a servicer in a short sale, the settlement agent

should be sure to procure a recordable power of attorney wherein the short sale lender has included the power to negotiate a short payoff.

Conclusion

While short sales are simple in structure, their proliferation has resulted in many subtleties not immediately evident to the experienced conveyancer, much less to the uninitiated. Consequently, and at the risk of betraying a professional bias, I would strongly suggest that conveyancers involve their title insurer immediately whenever they are presented with a short sale in any form. Title insurers have been able to garner a broad understanding of short sales consequent to having worked with their agents on these transactions both in New England and nationally. Ultimately it is this collective experience, available to every conveyancer through their particular underwriter, which can help to ensure that these transactions rarely, if ever, result in problems.

Send a letter to the editor.

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REBA-sponsored research examines home mortgage closing costs

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ment services to lawyers "is likely to cause . . .consumers to pay higher prices . . ."

But the actual empirical evidence on this matter has been, until recently, sparse, dated and mixed. The most comprehensive evidence dates back to 1978-1979, when the consulting firm Peat, Marwick, Mitchell (as part of their Congressionally-mandated evaluation of the first few years' experience with the workings of RESPA) analyzed a nationally-representative sample of almost 16,000 HUD-1 forms.

The evaluators concluded (emphasis added), "A number of participants in the settlement process, as well as numerous commentators, have expressed the opinion that the regular involvement of attorneys in the settlement process causes prices to be artificially high.

Although our findings indicate that this is sometimes true, they do not support the contention that the absence of attorneys causes prices to below . . . It appears that each of the participants in the title and conveyancing markets have the potential to charge very high prices in some markets.

The selected sample sites where attorneys are primary settlement service providers are Boston, Jacksonville, and Washington, DC . . . The HUD-1 data for these sites does not show a consistent pattern of particularly high prices. . ."

This report is not typically referenced in the agencies' submissions. Rather, if any empirical data are cited, they usually derive from a couple of small, very limited surveys carried out in New Jersey and Virginia, in 1993 and 1996 respectively, that suggest that lawyers cost more than lay conveyancing firms to close home loans.

CRA International (formerly Charles River Associates) was asked by REACH, an ad hoc consortium of real estate law interests (including REBA), to investigate whether the agencies' assertions are supported by up-to-date, nationally-representative empirical evidence. In particular, we investigated whether the amounts paid by consumers for residential mortgage settlement services were influenced significantly by either the effects of state regulations or customary business practices in the region, or the type of firm chosen as the settlement agent.

We carried out a survey among a representative sample of U.S. residents who, within the 12 months preceding the interview, had participated in a mortgage settlement either to purchase or refinance a residential property.

A total of 1,260 respondents participated in the survey in September and October 2006.

For the greater part, these respondents were members of a pre-recruited, randomly-selected panel of U.S. consumers maintained by Knowledge Networks, a high-quality survey research firm.

To qualify for interview, a respondent was required to have a copy of the "uniform settlement statement" (form HUD-1 or HUD-1A) in hand, and to be willing to transcribe information from identified sections of that form.

While the issued sample covered the complete U.S., it was stratified to emphasize those states that we believed were particularly germane to identifying any cross-sectional variations in closing costs that might be related to different competition regimes across the states.

The database assembled in our study is the only systematic, national scale attempt in the last quarter-century to quantify the closing costs experienced in a fully representative sample of loan settlements to purchase or refinance a home. Moreover, it is the only such effort to have combined transaction-specific details with information about the characteristics of the borrowers.

We used the survey responses to estimate the closing costs charged by the settlement agent for the sampled transactions. We defined "closing costs" as the charges imposed — to either the borrower or the seller — at the discretion of the settlement agent, excluding the pass-through of legitimate charges by third parties (such as for surveys, appraisals, inspections, or carrier services) or regulated charges (such as for title insurance). We explored econometrically how those costs varied with the characteristics of the transaction, the borrower and the region in which the transaction took place.

The key findings of our analysis are that of the various factors we considered as potentially influencing consumers' costs of settlement, regulatory considerations or the type of entity performing the closing were rarely the most important influence on such costs.

Because borrower- and region-specific factors are often significant influences on costs, analyses and data that ignore those effects (such as the New Jersey and Virginia statistics often cited by the federal competition agencies) will inevitably provide at best only partial, and at worst possibly erroneous, insights.

Across all of the market segments that we examined, there was no systematic evidence that "attorney only" jurisdictions, or settlement by attorneys, were associated with higher settlement costs to consumers.

We concluded that findings about closing costs contained in the most comprehensive previous study on the topic, the Peat, Marwick, Mitchell report, remain broadly correct.

Yes, there may well be some places, times, circumstances or market segments for which attorney settlements (or restrictions prescribing that only attorneys may provide settlement services) are associated with higher costs.

But equally, there appear to be other situations where the reverse is true.

And our comprehensive sifting of the new 2006 database provided no clear evidence of any systematic effect one way or the other. A full copy of our report may be downloaded from http://www.crai.com/ Publications/listing details.aspx?id=10944.

Roundup of REBA-proposed legislation

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a foreclosing mortgage holder; amend the judicial discharge provisions of §15 of G.L.c. 240 in order to allow a subsequent owner to bring an action to clear title after one year from the due date of the mortgage in the same manner as was provided for a mortgagor; and change the subsequent owner affidavit provisions under §54C of G.L.c. 183, to address the situation where a former owner can be located but he fails to cooperate. In effect, the affidavit to clear title could be used regardless of whether or not that former owner (i.e. the mortgagor) can be located. It does not change the requirements for the affidavit by the subsequent owner;

- it just broadens the occasions in which it can be used to include the most common situations, i.e. where the seller or some other prior owner can be located, but is uncooperative in responding to a reasonable request to clear title.

H. 3773 has been proposed by Richard Golder, co-chair of the REBA Registries Committee. It has four parts:

One, the standard for recording an instrument shall be that it meets minimum statutory recording requirements. It is felt that some registry personnel exercise undue discretion in accepting or rejecting recordable instruments. This provision would clarify the historic role of recording staff.

Two, no instrument shall be considered to have been recorded, until the register approves the instrument for recording and assigns to it an instrument number and/or book and page number, as the case may be. This would reverse an Appeals Court holding, *National Lumber v. Lombardi, 64 Mass App 490* (2005), which ruled that an instrument is considered to be timely filed upon proof of receipt by the register. Registers feel that this decision creates an unreasonable burden for them. See also H.1527, S.1861. REBA's issue is the need for a uniform reliable system for determining the order in which instruments are received and recorded by the registry staff.

Three, to provide for the orderly recording of instruments that are delivered or otherwise transmitted to a registry district, including by mail or electronic means, the secretary of the commonwealth may, by rule, regulation or guideline, establish a uniform practice for determining the order of receipt by the register.

Four, any change or correction to a particular record shall be documented in such a manner as to indicate that there has been a correction, and the nature and date of the correction shall become part of the record.

H. 3521 has been proposed by former REBA president Jon Davis. It would simply remove the requirement to include the full legal description in a newspaper-published foreclosure notice under G.L.c. 244 §14. This is an unnecessary but expensive cost in a foreclosure, and one which the debtor is required to pay as a cost of collection. Compare with Rhode Island law, which has given rise to the following salutary title standard:

Standard No. 7.6
Mortgage foreclosure advertisements

Legal descriptions in mortgage foreclosure advertisements shall not be considered insufficient merely because the foreclosed land is described by reference to the book and page or other recording reference of the mortgage. It is strongly recommended that this method of description be supplemented by references to street address or to a particular corner, or other similar identification, including the name of the mortgagor or mortgagors, unless previously set forth therein.