REBA NEWS

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*The Newsletter of the*

*Real Estate Bar Association for Massachusetts*

# A call for a new Superior Court standing order in zoning cases

**By Daniel P. Dain**

Standing is jurisdictional in zoning appeals. Unless the plaintiff project-opponent has standing, the court lacks subject matter jurisdiction and cannot address the merits of a zoning appeal.

In zoning cases, such as those under G.L.c. 40A, §17, standing is an inquiry routinely addressed through summary judgment motions, particularly because protracted litigation on the merits of zoning decisions can cause delays that can kill real estate development projects.

Unlike the typical summary judgment motion, however, adjudication in standing cases does not turn on whether or not there are material facts genuinely in dispute, because the standing inquiry is jurisdictional and not merit-based.

Rather, the standing inquiry is a two-step process under which the defendant project-proponent has a burden of production to come forward with some evidence to make standing an issue, and the plaintiff project-opponent has the burden of persuasion to establish standing.

This sequencing, under the first step of which the court focuses solely on the defendant's presentation, and under the second step of which the court focuses principally on the plaintiff's presentation, as set forth in cases such as *Standerwick v. Zoning Board of Appeals of Andover*, 447 Mass. 20, 34-35 (2006), and *Michaels v. Zoning Board of Appeals of Wakefield*, 71 Mass. App. Ct. 449, 453 (2008), does not fit neatly under the Superior Court Rule 9A framework.

Under current Superior Court

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# When your title insurer's parent is bankrupt, should you stay put or bail out?

**By Peter Nils Baylor and Jonathan C. Evan**

**BAYLOR**

**EVAN**

Property owners and real estate lenders breathed a sigh of relief when bankrupt LandAmerica announced it would be selling its title insurance subsidiaries, Commonwealth Land Title Insurance Company, Lawyers Title Insurance Corporation and two others, to Fidelity National Financial Inc. But it is not clear why relieved policyholders needed to be worried in the first place.

The iron rule of bankruptcy is that when your debtor goes bankrupt, all bets are off. Ordinarily, creditors of a bankrupt corporation stand in great peril and should reconcile themselves to the possibility of receiving little or nothing on their claims after months or years of waiting. But this depressing reality does not apply to insurance companies, because they are not eligible to file for bankruptcy under the U.S. Bankruptcy Code.

Section 109 of the code specifically excludes insurance companies from eligibility for bankruptcy protection, either voluntary or involuntary. 11 U.S.C. 109(b)(2). This ineligibility holds true even if their parent holding company has filed for bankruptcy.

Insurance companies are heavily regulated by the particular state in which they operate and are subject to strict capital adequacy requirements. The same degree of oversight and regulation is not applicable to their parent holding companies. This means that not only are the parents not required to maintain minimal capital levels, but they are permitted to engage in riskier and more speculative investment activities.

LandAmerica apparently foundered on $400 million in investor capital on deposit with a non-insurance subsidiary for 1031 exchanges (which allow investors to conditionally delay the payment of capital gains taxes on the proceeds from recently sold property). In its bankruptcy filings, LandAmerica stated that much of the deposited money went into commingled accounts

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## What's in this issue…



**A Supplement to Massachusetts Lawyers Weekly**

# Legislation in brief: the past, present and future

**By Edward J. Smith**

When the 185th General Court of the Commonwealth dissolves this month, among its accomplishments will be measures to improve or promote the development of "green" technology, health care cost containment, mortgage industry oversight, local aid/municipalities' cost containment, child welfare, business development and transportation, housing and other infrastructure development.

The economics of the real estate industry have been central to public policy deliberations on the national and state levels, and REBA's agenda has extended to policy-making on both.

For example, the REBA leadership has demonstrated interest in the promulgation of new RESPA regulation by the outgoing Bush administration and the extension of the FDIC's Temporary Liquidity Guaranty Program to IOLTA accounts.

We have advised the Massachusetts Legislature with respect to the regulation of the mortgage origination process and counseled restraint in making changes in the foreclosure process itself.

We expect REBA to be involved in the Patrick administration's proposals for zoning reform, which have been the focus of a special task force on which REBA is represented.

While modest in comparison with these and other ambitious goals of policy-makers, REBA will continue to advocate for improvements in conveyancing practice and promote consumer benefit in legislation affecting real property. Some measures, homestead reform and notary public regulation in particular, were still pending at this writing. Others recommended by REBA's Legislation Committee will be filed in the General Court this month.

A measure to simplify the procedure for withdrawal of land from registration when intending to create a condominium on registered land and to clarify filing requirements for corporate instruments affecting registered land will be filed.

REBA will also introduce legislation to simplify the form of the notice publication under G.L.c. 244, §14, for mortgage foreclosures, thereby reducing publication costs. Also, the execution requirements for mortgage foreclosure instruments under G.L.c.183, §54B, and technical aspects of the mortgage discharge practice should be simplified under REBA legislation.

Also, we expect to be active in addressing the so-called "mailbox rule" enunciated in the National Lumber case. The Massachusetts Registers of Deeds and Assistant Registers of Deeds Association will file legislation to provide that "no deed or instrument shall be considered to have been recorded, until said deed or instrument has been approved for recording by the register and a document number, instrument number or book and page has been assigned to said deed or instrument." Clearly, this leads to a discussion of a number of related issues.

Finally, the larger topic of land registration, along with its benefits and burdens, has long been a subject of sometimes intense debate. REBA's Legislation Committee has been reviewing a legislative option for full voluntary withdrawal of land from the registered land side of the registry so that it be considered "confirmed land," with the obvious benefits conferred by the Land Court's historic supervision, but with the prospect of more simplified transactions in the future.

*Ed Smith has represented the interests of the association and the transactional bar on Beacon Hill for over 20 years. He can be reached by e-mail at ejs@ejsmithrelaw.com.*

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*for Massachusetts*

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50 Congress Street, Suite 600
Boston, Massachusetts 02109-4075
Tel: (617) 854-7555
(800) 496-6799
Fax: (617) 854-7570

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617-218-8121

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

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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**

For leaner times, simpler holiday pleasures remain wonderful to savor. Though not as sophisticated to imbibe as some other bubbly drinks, ginger ale has always been a favorite holiday refreshment at our house (great with cranberry juice).

My wife, a traditionalist and Massachusetts native, always brings home a local brand, with "all-natural ginger" flavoring: It's Polar, headquartered in Worcester, where REBA holds its twice-yearly conferences.

I understand Polar is a company even older than the bigger national brands and is a dedicated local corporate citizen. And its product is the real deal. You may remember Polar tangled in court a few years back with one of those big national soft drink companies over a commercial with a polar bear.

Sound familiar? The more REBA lawyers I get to know, the more I admire them. They are the real deal. And they, too, are dedicated local professionals, working and, when necessary, fighting on behalf of their clients and their bar. I see this dedication everywhere I find REBA lawyers.

At REBA's spring and fall conferences, hundreds of REBA lawyers, from the Berkshires to the Cape to Federal Street, gather to share, broaden and update their legal knowledge with topical breakout sessions, legislative and case law updates and keynote speakers, from the director of research at the Federal Reserve Bank of Boston to Attorney General Martha Coakley. The professional, collegial spirit of these conferences is really wonderful to experience. At meetings of REBA's topical and working committees, lawyers deepen their relationships with colleagues and deepen their knowledge of the complexities and developments in specific aspects of real estate law and practice, from condominium law, to environmental regulation, to title insurance developments, to commercial finance.

Many committees are proactively engaged with those who make, apply and administer the laws, rules and regulations of our commonwealth in the area of real estate. The Legislation Committee has been at the forefront of the improved mortgage discharge law, as well as pending legislation to overhaul and clarify the existing homestead law.

The Litigation Committee is developing sample forms for common pleadings used by real estate attorneys.

The Title Standards Committee continually refines the invaluable REBA title standards while promulgating new standards to respond to the evolving challenges of clarifying title in today's transactional and regulatory environment.

The Registries Committee is engaged with our registers of deeds on such matters as emerging electronic filing practices and standards.

The Practice of Law by Non-Lawyers Committee has been vigilant and proactive on behalf of all of us in identifying

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*Steve Edwards is counsel in the real estate practice group of WilmerHale, 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.*

# Everything I know about the global economy I learned from Tedy Bruschi

**By Paul F. Alphen**

Because of publication lead times, this column was written before Thanksgiving, and considering the state of things in the world today, everything that appears below may be proven wrong by the time this gets published, but here goes …

At the beginning of the football season, the prognosticators had buried the New England Patriots. The talking heads on television and the radio shut-ins were certain that the loss of Tom Brady meant the end of "The Dynasty."

Well, the Patriots are still in the hunt. The team has played some fairly good football. As Tedy Bruschi told the media in early September: "Tom Brady never played a down of defense." The Patriots are without Brady, defensive leader Rodney Harrison and starting tailback Laurence Maroney, but the team keeps on going.

The same thing could be said about the future of our economy. Television is full of "experts" who have predicted the long-term demise of our economy. When are we going to learn that television news organizations typically come up with a premise, and then find mouthpieces to support the premise?

In 1964, Marshall McLuhan coined the phrase "The medium is the message" in his book "Understanding Media: The Extensions of Man." He was ahead of his time. The influence of television today cannot be understated. In the immediate future, the news networks will continue to hypnotize the public into believing that we will all soon be in breadlines. Fortunately, ratings will require that all the networks eventually find new topics upon which to perseverate (with the exception of Nancy Grace, who will be chasing the "Tot Mom" for the next 10 years).

The dot-com bubble was based on an idea and greed. It was based on the idea that countless companies could use the same business plan and transfer consumer and commercial trade from "bricks and mortar" to the Internet. The media encouraged us all to invest in the idea or be left behind in the dust. The bubble burst on March 10, 2000, and the media was quick to point fingers.

The subprime mortgage debacle was also fueled by greed and by the media "experts" who encouraged everyone within earshot of a TV set to buy a home (or homes) and take advantage of easy financing. People listened and eventually the bubble burst. Fortunately, every mortgage was secured by a piece of real estate. Unlike the dot-com bubble (which was unsecured), the subprime debacle was backed by good old dirt, bricks and mortar. The failing mortgages are not worthless (like the Internet-related stock I held in 2000). The mortgages may be worth quarters on the dollar, but it is hard to believe that in the final analysis the mortgages will, on average, be worth nickels or dimes on the dollar.

When the TV cameras eventually turn away from the geniuses on Wall Street who helped create the subprime debacle and now want you to help them recover their losses, the American people may look around and find that they are not in breadlines. And we should stop referring to subprime mortgages as "failed;" instead, we should refer to them as under-performing. When that day finally comes, we will collectively get back to what we all do best: go to work each day to take good care of our families … and pay school and college tuition.

*The immediate past president of the association, Paul Alphen is a partner in the Westford firm of Balas, Alphen & Santos, where he concentrates in residential and commercial real estate development, land use regulation, administrative law, real estate transactional practice and title examination. A frequent commentator in the pages of REBA News, he is a major fan of the Red Sox, Celtics, Patriots and his beloved Boston College Eagles. The basement "man cave" of his home in Westford boasts six flat screen televisions, permitting him to follow multiple sporting events simultaneously. Paul can be reached by e-mail at paul@lawbas.com.*

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# A call for a new Superior Court standing order in zoning cases

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Rule 9A(b)(5), the party moving for summary judgment must prepare a motion, brief and "a concise statement, in consecutive numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." The non-moving party then serves an opposition together with a paragraph by paragraph response to the moving party's statement of material facts (the non-moving party can also add additional material facts). Reply memoranda by the moving party are not allowed without leave of court, which cannot be obtained until after the filing of the motion/opposition 9A package.

The requirements of the Rule 9A package should be modified for summary judgment motions in standing cases before the Superior Court. This could be effectuated via a new Superior Court standing order that eliminates the need for a separate statement of undisputed material facts and allows the moving party to add a reply brief to the Rule 9A package.

The new contents of the Rule 9A package would include: the moving party's initial brief, affidavits and a concise description of the project; the non-moving party's opposition brief, affidavits, and a concise statement identifying each alleged aggrievement and the evidence supporting each aggrievement; and the moving party's reply brief, affidavits and comments on the non-moving party's identification of aggrievements.

The moving party's initial submission — brief, affidavits and concise description of the project — would address the defendant's burden of production to raise standing as an issue in zoning cases. If the plaintiff is not a party in interest under G.L.c. 40A, § 11 ("abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line") and hence enjoys no presumption of standing, then the moving party's initial submission should be very short, establishing only that plaintiff does not fit as a party in interest. If the plaintiff is a party in interest, then the moving party's submission would need to present "some evidence" to rebut plaintiff's presumption of standing. As the SJC explained in *Standerwick*, at the summary judgment stage, "a defendant is not required to present affirmative evidence that refutes a plaintiff's basis for standing." Rather, the defendant need only come forward with some evidence sufficient to warrant "a finding contrary to the presumed fact." 447 Mass. at 34-35.

This submission does not necessitate a statement of "material facts" with which the moving party believes there is no genuine issues. It would, however, require at least a description of the project; an identification of potential impacts that the plaintiff has raised or is likely to raise, based on statements by the plaintiff at the zoning or planning board hearing or in the media, testimony from the plaintiff at a deposition, or common sense; and, depending on the types of impacts identified, possibly expert affidavits.

The plaintiff, under the revised 9A package, would serve on the moving party a brief, affidavits, and a statement identifying the plaintiff's claimed aggrievements and the evidence supporting each aggrievement. At this stage of the inquiry, the plaintiff has the burden of persuasion that it must try to meet by introducing affidavits that establish that it will suffer a "legally cognizable," "substantial" and "special and different" injury. The evidence presented must not be speculative or conclusory.

On summary judgment, the court's inquiry is whether or not the plaintiff has shown a "reasonable expectation of proving a legally cognizable injury" at trial." *Standerwick*, 447 Mass. at 35. This inquiry "requires consideration solely of the quantity and quality of evidence the plaintiffs have presented, not the comparative weight of the plaintiffs' testimony and the defendants.'" *Michaels v. Zoning Board of Appeals of Wakefield*, 71 Mass. App. Ct. 449, 453 (2008).

The court may, however, examine affidavits submitted by the defendant that

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*Dan Dain, a founder and managing partner of Brennan, Dain, Le Ray, Wiest, Torpy & Garner, is a trial lawyer who represents real estate developers and property owners, with a particular expertise in zoning disputes. He also maintains a commercial litigation practice and represents clients in insurance coverage disputes. Dan can be contacted at ddain@bdlwtg.com.*

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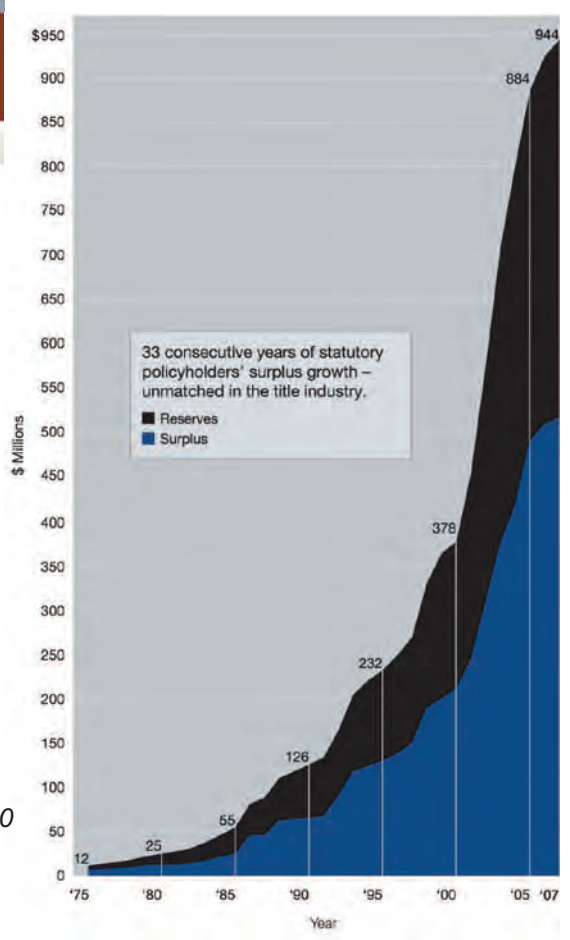


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# HUD releases final RESPA rule — finally!

**By Joel A. Stein**

In early November the Department of Housing and Urban Development issued its final Rule on the Real Estate Settlement Procedures Act. This is the culmination of a six-year process.

The final rule and accompanying 341-page commentary contain significant changes from the version that was originally released for comment in March 2008. HUD has shortened the Good Faith Estimate and HUD-1/1A and has eliminated the controversial "closing script." The HUD press release notes that the mortgage reforms will help consumers to shop for the lowest cost mortgage and "avoid costly and potentially harmful loan offers."

HUD will require mortgage lenders and brokers to provide borrowers with a three-page Good Faith Estimate, which includes a summary of the loan, escrow account information and a summary of settlement charges. The GFE also includes a "trade-off table" on the third page, which will allow borrowers to compare similar loans with different settlement charges and interest rates. The third page also includes a "shopping chart," which will allow the borrower to compare loans offered by different originators.

At present, the preferred practice is to provide disclosure of the agent/underwriter split on the HUD-1/1A. The new HUD-1/1A will require disclosure of the split.

HUD has withdrawn the proposed requirement that closing agents read and provide a "closing script." A new third page of the HUD-1 settlement statement includes a comparison of GFE and HUD-1 charges. This comparison will be reviewed at the closing by the attorney or settlement service agent. The comparison includes charges that cannot increase between the GFE and time of closing (i.e., origination charge, credit or charge points for the specific interest rate chosen, adjusted origination charges and transfer taxes) and those charges that cannot increase more than 10 percent (i.e., government recording charges). Charges that can change include the initial deposit for the escrow account, daily interest charges and homeowner's insurance.

The new third page also includes a review of "loan terms" including: (a) initial loan amount; (b) loan term; (c) initial interest rate; (d) initial monthly amount owed for principal, interest and any mortgage insurance; (e) whether the interest rate can rise; (f) whether the loan balance can rise even if payments are made on time; (g) whether the monthly amount owed for principal, interest and mortgage insurance can rise even if payments are made on time; (h) whether the loan has a prepayment penalty; (i) whether the loan has a balloon payment; (j) total amount owed, including escrow amount payments.

The closing script was a concern for many settlement service providers who were concerned that reviewing the closing package with a borrower would be judged as an unauthorized practice of law. Possibly to avoid that issue, at the bottom of the new third page of the HUD-1/1A, a note reads: "If you have any questions of the settlement charges and loan terms listed in this form, please contact your lender."

Tolerances remain in the final rule, although the rule now provides a right to cure for amounts of excess in tolerances and for HUD-1/1A errors. Origination and lender costs may not increase, although settlement services recommended by the lender and chosen by the borrower are subject to a 10 percent tolerance between the GFE and the closing cost. Individual services may exceed the tolerance as long as the total remains under 10 percent. Recording fees are also permitted a 10 percent tolerance while transfer taxes are subject to a zero tolerance.

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*Joel Stein co-chairs the REBA Title Insurance and National Affairs Committee. A former REBA president, he is a recipient of the association's highest honor, the Richard B. Johnson Award. He currently serves on the REBA committee working with the Land Court to promulgate guidelines to streamline recording issues. He can be contacted at jstein@steintitle.com.*

# When your title insurer's parent is bankrupt, should you stay put or bail out?

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that invested in auction-rate securities that have since become illiquid. The sale of its insurance company subsidiaries to Fidelity National makes it virtually inevitable that LandAmerica and its non-insurance subsidiaries will be liquidated under Chapter 11.

LandAmerica's individual insurance companies, however, never engaged in these activities. While it is entirely possible for an insurance holding company to bring its insurance subsidiaries low — some readers may remember the collapse of Monarch Capital Corporation in the 1990s — such episodes are relatively and mercifully rare, and the financial health of the parent holding company is not a reliable indicator of the financial health of its subsidiary insurance companies. As a result, a parent's filing of a petition for bankruptcy is not necessarily a harbinger of the fate of the subsidiaries that actually issue the individual insurance policies.

In fact, insurance regulators in Nebraska, where LandAmerica's two biggest title insurance operations are domiciled, at no point told the companies to stop issuing new insurance policies. Although Commonwealth and Lawyers are currently under a rehabilitation order, it is merely a precautionary order, and the Nebraska Department of Insurance stated that both entities are solvent and will continue to transact business and pay claims in the ordinary course of business. The press release issued by the Nebraska DOI can be found on its website at www.doi.ne.gov/notices/nrelease.htm.

This is certainly not to suggest that policyholders doing business with subsidiaries should ignore the implications of the insurance holding company's filing for bankruptcy, as the parent's illness may be contagious.

In keeping with the federal government's general hands-off practice regarding the insurance industry, the McCarran-Ferguson Act of 1945 enshrines this practice in statute and provides that state insolvency laws govern the procedures for rehabilitating and liquidating insolvent insurers. 15 U.S.C. 1011. The state's insurance regulator may appoint a conservator or rehabilitator to rehabilitate the insurance company, institute a reorganization proceeding or appoint a special officer to liquidate the insurer. The regulatory responses available to the insurance regulators vary by state, and the Massachusetts scheme is set forth in Chapter 175 of the General Laws.

Perhaps the argument could be made that state insolvency proceedings are more tolerable for policyholder-claimants. While priority is a matter of statute in each state, policyholders in an insurance company insolvency proceeding are generally first in line after the payment of administration expenses, taxes and the wages of the company's employees, and ahead of the company's other creditors. In Massachusetts, the priority of claims by policyholders is also governed by Chapter 175 of the General Laws.

This priority does not, of course, guarantee full recovery. The disaster formerly known as "Lloyds of London" was an ocean away, but removed any doubt that an insurance enterprise could be abjectly insolvent. As a result, if the parent holding company of an insurance company files for bankruptcy, it is generally advisable to contact an attorney to determine the potential impact on any existing or pending policies. At a minimum it is generally a wise practice, where appropriate and possible, to obtain co-insurance and/or reinsurance.

Indeed, Fidelity National, along with its principal subsidiary, Chicago Title Insurance Company, has entered into reinsurance agreements with the LandAmerica subsidiaries it plans to acquire, presumably to calm the natural concerns of the policyholders who should soon be Fidelity National customers. The Bankruptcy Court hearing to approve the sale to Fidelity National was scheduled for Dec. 16.

The collapse of AIG is also instructive and demonstrates the need for vigilance. Before the federal government stepped in to try to bail it out, there were published reports that New York State insurance regulators were considering a special dispensation to permit parent AIG to tap the assets of its policy-writing subsidiaries. Cooler heads prevailed, and policyholders were able to climb back into their offices from their window ledges.

*Peter Nils Baylor is a partner at Nutter, McClennen & Fish in Boston, which he joined in 1978. He devotes much of his practice to bankruptcy and creditors' rights. Jonathan C. Evan is an associate in the firm's business department. His practice focuses on both general corporate transactions and bankruptcy.*



# HUD releases final RESPA rule — finally!

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The second page of the GFE includes "origination charge" defined as the charge "for getting the loan to you." The origination charge does not distinguish between a payment by the lender to a mortgage broker, the Yield Spread Premium or a payment by the borrower directly to the lender. HUD claims that treating the payment in this way will not create a consumer bias against brokers and that through consumer testing, the department found that the new GFE helped consumers to select the lowest cost loan nine out of 10 times "regardless of whether the loan was originated by a lender or a broker."

The final rule has also retained average cost pricing for settlement service providers. This excludes only services that are based on the value of the property or the loan and includes fees for services such as overnight charges and courier fees. The final rule also retains the "required use" provision but redefines "required use" to "make it clear that economic disincentives that are used to properly influence a consumer's choices are as problematic under RESPA as are incentives that are not true discounts."

The change to the definition of "required use" will not eliminate the ability of anyone to offer legitimate consumer discounts. HUD does not interpret RESPA as preventing a settlement service provider or anyone else from offering a discount or other thing of value directly to the consumer. However, RESPA in this final rule limits tying such a discount to the use of an "affiliated settlement service provider."

The borrower is to be provided with the GFE three days after the loan originator's receipt of all necessary information, and HUD will permit lenders and settlement service providers to correct potential violations of RESPA's new disclosure and tolerance requirements by allowing 30 days from the date of the closing to correct errors or violations and repay consumers over any charges.

HUD received an excess of 12,000 comment letters after the issuance of the initial rule, which was issued in March 2008. In addition to reviewing the comments from brokers, bankers, attorneys, ALTA and settlement service providers, the OMB met with industry trade groups in September 2008 and OMB officials met with representatives of HUD, the White House and the office of the vice president.

Brian Montgomery, HUD's assistant secretary of housing, stated: "I am convinced that we successfully balanced the needs of consumers with those in the business on home ownership. None of us can lose sight of the fact that millions of Americans simply don't understand the fine print of their mortgages and this, in many respects, is at the heart of today's mortgage crisis."

Congress now has a 60-day review period during which time they could reject the rule and force HUD to start anew. Because Congress is currently in recess and may reconvene for just a few days, it would appear that fewer than 60 legislative days remain in the current Congress. Under law, that would give the new Congress a new 60-day legislative window in 2009.

Although certain sections of the law will take effect immediately, the new standardized GFE and revised HUD-1 will not be required until Jan. 1, 2010, although they may be used at any time before then.

# A call for a new Superior Court standing order in zoning cases

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challenge whether the plaintiff has the "reasonable expectation of proving a legally cognizable injury" at trial. *Michaels*, 71 Mass. App. Ct. at 453 n.7. The court can consider the defendant's arguments that the plaintiff's evidence is speculative or conclusory.

Thus, the *Michaels* analysis contemplates — and perhaps requires — an opportunity for the defendant moving party to respond to the plaintiff's summary judgment submission. The defendant should be provided an opportunity to argue that plaintiff's affidavits are speculative or conclusory, or describe injuries that are not "legally cognizable," "substantial" or "special and different."

It cannot be expected that the defendant moving party's initial summary judgment submissions would have fully anticipated and addressed all potential aggrievements that the plaintiff will claim during the second step of the standing inquiry. Further, until the defendant moving party sees the plaintiff's summary judgment submission, the defendant will not be able to comment on the "qualitative" aspect of the plaintiff's standing submissions — whether they are speculative or conclusory.

Thus, for the court to take advantage of the defendant moving party's commentary on the plaintiff's efforts to meet its burden of persuasion on standing, there needs to be an opportunity to submit a reply brief. Requiring leave of court in every motion for summary judgment on standing grounds in zoning cases is cumbersome and inefficient.

In short, a new Standing Order could adapt Superior Court Rule 9A(b)(5) to better fit the summary judgment standing inquiry, focusing the "concise statements" on a description of the project and an identification of alleged aggrievements, and permitting reply briefs without leave of court.

# From the president's desk

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and challenging the encroachment of business practices and enterprises that threaten to remove professional standards and accountability from conveyancing transactions in the commonwealth. The centerpiece of this work at present is REBA's lawsuit against out-of-state closing services company NREIS, currently pending in federal court. REBA is seeking an injunction against NREIS's closing practices as the unauthorized practice of law. After extensive (and expensive) document discovery and depositions, cross motions for summary judgment have been filed.

This is not, however, the only focus of this committee. The so-called TAVMA bill, seeking to except conveyancing from the state unauthorized-practice-of-law statute, has been filed in the last several legislative sessions, and REBA actively opposes this bill.

The UPL Committee also remains active in identifying and confronting others who seek to conduct real estate closings without a conveyancing attorney.

There are numerous other active REBA committees, from the Affordable Housing Committee and the Amicus Committee to the Continuing Education Committee and the Land Use and Zoning Committee, among others. Through all of these committees, REBA actively works for, advocates for and, when necessary, fights for every Massachusetts real estate and transactional lawyer.

In addition to getting to know more colleagues at REBA's conferences and in the work of REBA's committees, I have also begun in my new role attending regional real estate bar gatherings with leaders of REBA's Residential Conveyancing Committee. My experience at these gatherings, too, strengthens my appreciation and admiration for our conveyancing colleagues in every corner of the commonwealth and in every aspect of real estate practice.

One Massachusetts real estate lawyer may be working to bring together a buyer, seller, first and second mortgages and a private mortgage insurer to achieve a short sale for a distressed homeowner. Another may be coordinating real estate transfers and forms of ownership to be consistent with the nuances of family issues and estate plans. Another is navigating the legal, political, corporate and economic complexities of permitting and financing a commercial project.

These lawyers are colleagues to be proud of, to support and to celebrate as a real estate bar.

I encourage you, in this wintry season in which chilly economic winds are blowing, to take this time to build the strength of your profession and your practice by joining and participating in REBA and to support one another by supporting REBA's work on behalf of the profession. I invite you to invest in building your professional knowledge and relationships by participating in REBA's twice-yearly conferences, committees and regional meetings in the year ahead.

REBA is like its members: As a bar association, working on behalf of its members and the wider bar, it is the real deal.

# 2008 Annual Meeting & Conference