REBA NEWS

Fall 2010
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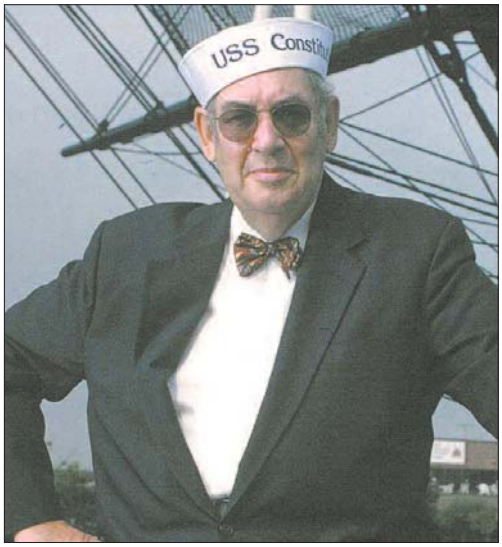
The Newsletter of the
Real Estate Bar Association for Massachusetts

REBA to honor Haskell Shapiro at November annual meeting

Haskell Shapiro, a legend in Massachusetts title practice for nearly 40 years, retired last month. He received the association's lifetime achievement award, the Richard B. Johnson Award, in 1996. Haskell will again be honored at REBA's 2010 Annual Meeting and Conference on Monday, Nov. 8, at the DoubleTree Hotel in Westborough. David Merrill, who worked closely with Haskell for many years, has offered the following tribute.



Given that one-name recognition is a sign of accomplishment, the name "Haskell" represents overwhelming accomplishment in the field of title insurance for nearly 40 years, and in the field of title

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Mortgage discharge law updated

By Elizabeth J. Barton

In October 2006, the modernization of mortgage discharges took effect with the implementation of Chapter 63 of the Acts of 2006. Called the new "Mortgage Discharge Act," Chapter 63 replaced both Sections 54 and 55 of G.L.c. 183 and shortened the maturity of a mortgage to 35years (G.L.c. 260 § 33).

The law incorporated new technology, updated real estate definitions and added new procedures to discharge mortgages by affidavit. REBA created mortgage discharge forms that comply with the terms of the revised statutes.

The new laws were put into practice with success, and banks are noticeably more prompt in responding to requests for payoff statements and discharges. Practice revealed some necessary updates to portions of the statutes, and those were accomplished with the recent passage of Chapter 282 of the Acts of 2010.

1) The definition of "Mortgagee" in Section 54 of G.L.c. 183 is expanded to include the "off-record successor mortgagee" concept. A lender which has become defunct since the date of the mortgage, and has become a successor entity or merged into another entity is included in the definition of "Mortgagee". The fact of succession or merger may be shown by reference to other documents which are on record, but are not in the chain of title, or by record-

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Legislature revamps foreclosure procedures

By Francis J. Nolan

In the final days of this year's formal session, the Legislature passed a bill that expands existing pre-foreclosure notice requirements and creates a new statutory chapter granting additional protections to tenants impacted by foreclosures.

This is the second time in the past three years that the Legislature has taken action regarding foreclosure procedures. In November 2007, the Legislature created G.L.c. 244, §35A, which required lenders to send a notice allowing borrowers a 90-day right to cure a payment default before a foreclosure action could be initiated.

The new bill, S 2407, (Chapter 258 of the Acts of 2010) temporarily revises G.L.c. 244, §35A. The law now requires that lenders send a 150-day right-to-cure notice rather than a 90-day notice in any case where the property sought to be foreclosed is the borrower's principal residence and is collateral for a residential loan. The notice requirement also only applies to one to four family properties where the property is occupied, or to be occupied, in whole or in part by the borrower.

Pursuant to the new law, a lender can opt to send a 90-day notice instead of a 150-day notice if it can certify that it has engaged in a good faith effort to negotiate a commercially reasonable alternative to foreclosure. In order to demonstrate "good faith" as anticipated by the statute, the lender must consider a number of factors, including the borrower's income, debts and expenses; a comparison of the net present value of payments under a modified loan versus the anticipated net recovery from a foreclosure; and other interests of the lender. Documentation of the "good faith" analysis must be provided to the borrower at least 10 days before a meeting, either by telephone or in person, between the lender's representatives and the borrower or the borrower's representatives.

If the parties fail to reach a mutually acceptable alternative to foreclosure, the lender may then proceed with a 90-day notice. The lender must file an affidavit with the Land Court, with a copy to the borrower, evidencing in detail its compliance with the statutory good faith requirements.

If the borrower fails to respond

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What's in this issue…

A Supplement to Massachusetts Lawyers Weekly

REBA launches Technology Committee

REBA has launched a Technology Committee, open to all members, as a member resource to demonstrate that technology is a tremendous asset to lawyers competing in today's fast-changing marketplace.

"This is a member-driven initiative," said REBA President Tom Moriarty. "I am delighted to nominate co-chairs with cutting-edge experience, Jim Sifflard and Richard Vetstein."

Jim Sifflard, director of agent technology solutions in New England for First American Title Insurance Compa-

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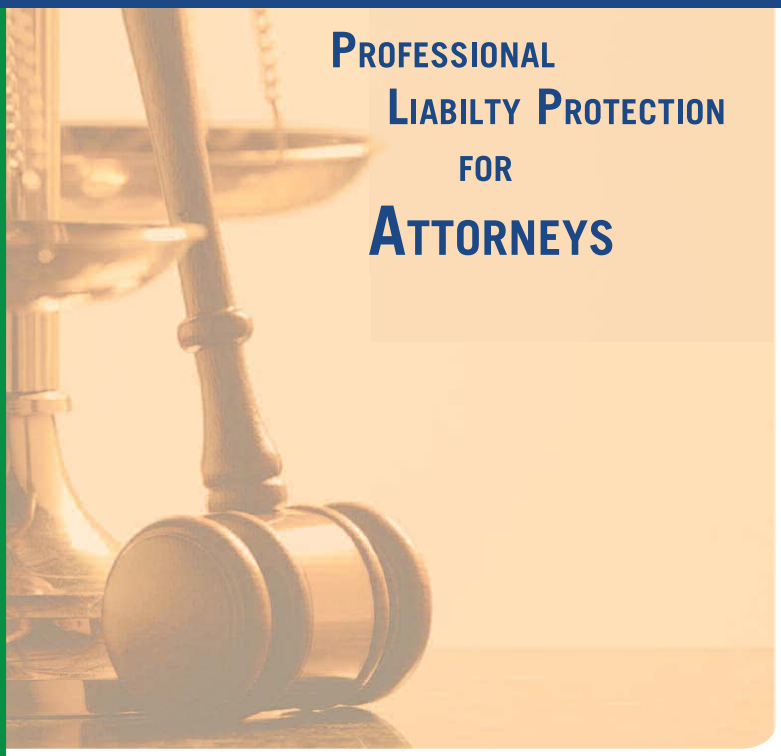

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REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

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Mission Statement

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

Mentoring Statement

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

From the President's desk

By Thomas O. Moriarty

I am confident that many REBA members have already received their dues invoice for 2011. I am equally confident that most have dutifully forwarded payment ensuring they will reap the many benefits of REBA membership next year. Others, however, may contemplate their dues statement and ask, "What has REBA done for me lately?" If you have missed the many e-mail updates, publications, articles and cases detailing REBA's exploits in 2010 (i.e., you have been holed up in some subterranean lair since January), let me answer that question.

REBA leads the fight against the unauthorized practice of law in the commonwealth. We scored a major victory in the NREIS case before the 1st U.S. Circuit Court of Appeals. The 1st Circuit vacated the District Court's judgment against REBA on the merits of the case while reversing the award against REBA of approximately $904,000 in attorneys' fees. The 1st Circuit went on to certify two questions to the Supreme Judicial Court:

1) Whether NREIS's activities either in whole or in part, based on the record in this case and as described in the parties' filings, constitute the unauthorized practice of law in violation of G.L.c. 221, §§46, et seq.; and

2) whether NREIS's activities in contracting with Massachusetts attorneys to attend closings violates G.L.c. 221, §§46 et seq.

The certification of these questions to the SJC affords REBA the opportunity to definitively establish the essential role of the lawyer in the conveyancing process.

Toward that end, Attorney General Martha Coakley's office intends to file an amicus brief supporting REBA's position. As the public authority charged with enforcement of the UPL statute in the commonwealth, we are encouraged that the attorney general has determined that the issues to be decided are substantial enough to warrant her office's involvement.

Several other organizations intend to file their own amicus brief and/or join in the amicus brief to be filed by the Massachusetts Bar Association supporting REBA. We are grateful for strong support from the leadership of the MBA, including immediate past President Valarie Yarashus and President Denise Squillante, as well MBA general counsel and chief operating officer Marty W. Healy. We are heartened that other entities, both public and private, not only share our concern about the fundamental importance of this issue, but are also willing to support our efforts. Argument before the SJC has been scheduled for Nov. 2.

REBA also filed the following amicus briefs on various issues this year, to the benefit of its members:

- *Arno v. Commonwealth of Massachusetts*, which weighed the integrity of the registration process against public rights in the tidal flats.
- *Faneuil Investors Group Ltd. Partnership v. Dennis*, which involved the question of whether Massachusetts would remain a title theory state with regard to mortgages. The Supreme Judicial Court recently entered a decision consistent with REBA's analysis and argument.
- *U.S. Nat'l Bank Association v. Antonio Ibanez*, which deals with the validity of a foreclosure by a bank that was not the holder of the mortgage at the time of foreclosure. REBA will file an amicus brief arguing the Land Court ruling should only be applied prospectively.

The REBA amicus briefs in these and prior cases are all available on our website, www.reba.net.

On Beacon Hill, REBA continues to press homestead reform and notary public regulation as principle legislative objectives. Both bills have been passed by the Senate. We are optimistic that the House will take them up this year in informal session. We are pleased with the enactment of Chapter 282 of the Acts of 2010, some technical improvements and corrections to REBA's landmark 2006 mortgage discharge legislation. Also, Chapter 298 of the Acts of 2010 rectified the untoward result of the 2005 *National Lumber* case.

In Washington, REBA worked collaboratively with the House Financial Services Committee to insure a robust exclusion for lawyers from the regulatory ambit of the new Consumer Financial Protection Bureau. This legislation is discussed in detail elsewhere in REBA News.

In addition to legislation, REBA continues to perform its educational function while serving as our members' voice and liaison with the judiciary, the governor's office and other executive departments of the commonwealth, the many registries of deeds and the title insurance industry.

In short, REBA has done a lot for you this year. With your continuing support REBA can advance our shared mission for years to come. So renew your membership for 2011 and join any committee that may interest you. Your participation, at whatever level, helps REBA remain vital. I know that you will benefit both personally and professionally from your involvement.

Tom Moriarty chairs the litigation practice group at Marcus, Errico, Emmer and Brooks in Braintree. He can be contacted at tmoriarty@meeb.com.

REBA Dispute Resolution neutrals approved for U.S. Bankruptcy Court

The mediators on REBA's alternative dispute resolution affiliate, REBA Dispute Resolution, have been qualified for inclusion on the U.S. Bankruptcy Court's mediation list of available neutrals. These individuals are available to serve as mediators in disputes that arise in bankruptcy cases in contested matters or in adversary proceedings.

"We are delighted to be able to serve the mediation needs of the bankruptcy, insolvency and business reorganization bar and clients, said Mel Greenberg, president of REBA/DR. "Our program is approved for a number of divisions of the Massachusetts Trial Court, including the Superior Court, the Housing Court and the Land Court. And now our neutrals are qualified for the U.S. Bankruptcy Court."

The following REBA/DR neutrals are now on the court's mediation list:

Hon. Christopher J. Armstrong (ret.)
Hon. Suzanne V. Del Vecchio (ret.)
Robert W. Foster, PE, PLS
Robert T. Gill, Esq.
Hon. Mel L. Greenberg (ret.)
Michael P. Healy, Esq.
Robert J. Hoffman, Esq.
Hon. Rudolph Kass (ret.)
Hon. Peter W. Kilborn (ret.)
Hon. Leon J. Lombardi (ret.)
Edward W. McIntyre, Esq.
Joel M. Reck, Esq.
Joseph P. J. Vrabel, Esq.

For more information about the U.S. Bankruptcy Court's mediation list and Standing Order 09-04, which established the court's alternative dispute resolution program, go to www.uscourts.gov/mab.

'Appropriate conditions' under Chapter 40B

By Kathleen M. O'Donnell

It has been said that military tacticians are always fighting the last war. Municipalities and developers have long battled over the use of comprehensive permits leading to the upcoming referendum on chapter 40B. The allegations of hidden profits, inflated purchase prices and sloppy monitoring of project costs and sales have a certain nostalgic charm now that the real estate boom has gone bust.

The recent decision by the Supreme Judicial Court in *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee* issued on Sept. 3 is an example of this aphorism.

(It is important to remember when reading this decision that the Zoning Board of Appeals was working under the rules and regulations for comprehensive permits in effect prior to the Department of Housing and Community Development's 2008 revision of 760 CMR, which replaced 760 CMR §§30.00 and 31.00 with 760 CMR §56.00.)

In June 2005, the developer submitted an application to the Zoning Board of Appeals seeking a comprehensive permit for the construction of a 40-unit condominium project with 10 units of affordable housing. The project was approved by the board.

The permit was issued in September 2006, with 94 conditions, including those relating to profit limits, review of financing documents and requirements for regulatory agreements and restrictions, in addition to the usual conditions on construction and design of buildings and improvements. The developer appealed the board's decision to the Housing Appeals Committee. As one basis for the appeal, the developer provided correspondence from MassHousing indicating it would not approve the financing for the project unless several of the conditions imposed by the board were deleted or substantially modified.

By a summary decision, the HAC removed or modified many of the conditions which gave rise to the developer's appeal. The HAC stated that the developer did not have to do the usual demonstration that the conditions rendered the project "uneconomic" because, in the view of the HAC, the board lacked the statutory authority to impose these conditions. The Superior Court upheld the HAC decision and further appellate review was transferred to the SJC on its motion.

The court addressed two issues in this decision: first, the scope of a zoning board's authority under Chapter 40 B section 21 to impose conditions on the issuance of comprehensive permit; second, the extent of the authority vested in the HAC under chapter 40B, section 23, to review any conditions that have been imposed by local zoning board.

The board argued that, under section 21, it had the right to impose "appropriate conditions" to address local concerns. It placed great faith on the language in section 21 that gives a zoning board the authority to issue permits and approvals in connection with the comprehensive permit as if it were any other local board or official, "including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site

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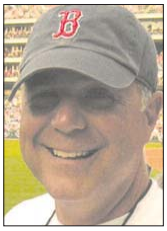
A former president of the association, Kathleen O'Donnell is a sole practitioner based in Milton. She was a member of former Gov. Mitt Romney's task force on chapter 40B and helped draft legislation that established smart growth zoning under chapter 40R and authorized the creation of municipal affordable housing trusts as alternative ways to create affordable housing in the commonwealth. A frequent commentator on chapter 40B issues, Kathleen can be reached at kmeodonnell@verizon.net.

We make the practice of real estate law look too easy

By Paul F. Alphen



I listen to sports talk radio despite the fact that it drives me crazy, and one of the things that particularly drives me crazy are the callers and talk-show hosts who think they can coach better than Terry Francona, Bill Belichick or Doc Rivers.

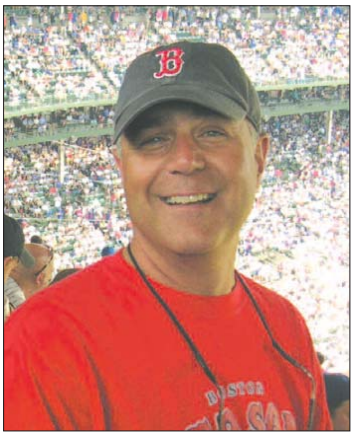
As soon as Jonathan Papelbon blew a few saves, all of the talk-show geniuses went on the air and announced that they would have never put "Pap" in some particular game, and that the coach is an idiot. I realize that some of the calls originate from the callers' parents' basements, and they are not qualified to have an opinion on such matters, but it still drives me crazy that we provide 50,000 watts of broadcast power to them.

Perhaps it drives me crazy because I see so many people who also think that they know more about real estate law than those of us who spent four years in college, three or four years in law school, and numerous years practicing the profession. As Rodney Dangerfield would say, "I get no respect."

I read a John Grisham book on my two-day summer vacation (the title isn't important; all of his books are beginning to blend together). Of course the story centered around a group of hard working, brilliant litigators. The narrator stated that if the class action suit that Attorney Brilliant was pursuing didn't work out, he might as well go back to his home town and practice real estate! Oh, the humility of it all!

It seems today that it is a common misconception that anyone can perform a real estate closing. My siblings thinks that real estate law is for the simple-minded because their only experience with a real estate lawyer involves attending a closing and signing documents while the lawyer tells funny stories.

I believe that as closing attorneys, we would have garnered more respect if we'd built a bar around the closing room, allowing only the attorneys beyond the bar and allowing only us to speak, unless a buyer or seller were responding to a direct question from the closing attorney. I wish I could jump up and announce: "I object to the introduction of that punch list at this late date in the proceedings!"



Most of my practice involves real estate development — another area where only the clients appreciate the complexity of the practice. The general public, board members and municipal officials never hesitate to voice their opinion that the attorneys are wrong.

I recently submitted a memorandum regarding a proposal pending before a local board, loaded with statutory and case law citations in support of my client's position. The next day the town planner responded with a memo to the board concluding that I had misinterpreted the law… but he failed to provide any further explanation, reasoning or caselaw to support his conclusion. How do you respond to that? Even the non-attorney advocate for the opposition submitted a memo to rebut my memo, but it was loaded with conclusions and conjecture instead of caselaw.

Litigators have it easy. Their opposition responds point-by-point with case analysis intended to rebut their claims, and the final decision is rendered by an experienced judge who typically previously practiced law. I get to make my arguments to a potpourri of elected or ap-

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REBA News sports editor Paul Alphen has visited every major league baseball park on the North American continent. He currently serves as the association's treasurer and chair of the Long-term Planning Committee. Paul practices in Westford with Balas, Alphen and Santos. He can be contacted at paul@lawbas.com.

Land Court plans move to 3 Pemberton Sq.

As of press time, final plans are being made to move the Land Court from its leased space at 226 Causeway St. in Boston to the commonwealth-owned Suffolk County Courthouse at 3 Pemberton Square.

The court will have public space, including the recorder's office and its courtrooms, on floors 4, 5, and 11, with additional space for file and plan storage on 3M. The move date is scheduled for mid-December. Further notices regarding the court's December schedule will be forthcoming as soon as the move date is set.

Abolishes 'Mailbox Rule'

Legislation clarifies recording requirements at registries of deeds

By Richard M. Golder

In 2005, the Appeals Court issued a decision in *National Lumber Co. v. Lombardi & Others*, 64 Mass. App. Ct. 490, 834 N.E. 2d 267 (2005), which many registers of deeds and many of us in the conveyancing bar found unsettling.

The court concluded that an instrument sent to the registry of reeds by Federal Express was considered to be recorded on the day it was signed for and received, rather than on the day it was actually recorded by the registry staff — 37 days later. Had the court held otherwise, that the actual recording date controlled, a mechanic's lien filed by the plaintiffs would have been unenforceable and dissolved. While the holding may appear to be a fair result, based on the facts in *National Lumber*, the integrity of the recording system was left at risk.

A short summary of the facts is as follows: National Lumber Company is a supplier of building materials. In March 2002, JAG Builders executed a contract with National to purchase materials for use in construction work at the home of the Blumes in Walpole. JAG purchased a significant amount of building materials from National on credit and failed to pay the outstanding balance. National pursued its rights under G.L.c. 254 §4 to secure a mechanic's lien against the real property of the Blumes and recorded a notice of contract and statement of account in a timely fashion. The final step in the process to perfect a mechanic's lien is to file a complaint in the appropriate court and record a certified copy of said complaint in the registry of reeds where the land lies, within 30 days of commencement of said action.

National filed its complaint in Wrentham District Court in a timely fashion, on Nov. 26, 2002. On Dec. 3 of that year, National enclosed a certified copy of the complaint, along with a check for the correct recording fees in a Federal Express package for next day delivery.

Although it's getting difficult for us to remember those heady days, 2002 was an extraordinarily busy time for the real estate industry. The volume of closings and refinances pushed all aspects of real estate transactions to the limit. Law firms, title examiners and the registries of deeds were understaffed and doing their best to keep up with unrelenting workloads. As a result, the procedure at the Norfolk County Registry of Deeds was to open any package received by Federal Express and review the contents to see if a check was enclosed and the instruments were in the proper form for recording. If there was an obvious problem, the papers were returned to the sender. If not, the package went into a box for recording when time permitted.

The certified copy of National's complaint was received on Dec. 4 and was opened and placed in a box with a large volume of other instruments for future recording. The deadline for recording the complaint in a timely manner was Dec. 26, 2002. Unfortunately, the registry didn't actually record the instrument until Jan. 9, 2003.

The Blumes filed an application in District Court to discharge the mechanic's lien on the grounds that National had failed to record a certified copy of the complaint in a timely fashion. The lower courts denied the Blumes' application and the matter found its way to the Appeals Court. In its discussion of the case, the court acknowledged that as a "creature of statute" the requirements for perfecting a mechanic's lien "compel strict compliance."

Since it was clear that there was not strict compliance with the 30-day recording requirement, the court changed its focus to whether "National did everything it reasonably could to achieve the requisite recording." This is where the registers and most of us in the conveyancing community break stride with the court.

In an affidavit submitted by a registry official, it was acknowledged that had National submitted the complaint to the recording counter by hand on any weekday, it would have been recorded that

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The co-chair of REBA's Registries Committee, Dick Golder is a partner at Marsh, Moriarty, Ontell & Golder, a Boston real estate boutique firm with an emphasis on complex title and conveyancing matters, including litigation in the Land Court and Superior Court. Dick can be contacted at rgolder@mmoglaw.com.

Obama signs H.R. 4173 to restore financial stability

By Richard A. Hogan

President Obama recently signed H.R. 4173, a bill touted "to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."

While the legislation is massive, approximately three-quarters of the law's provisions will be implemented by the adoption of regulations by federal regulators over the next few years.

A member of REBA's Legislation Committee, Rich Hogan is legislative and regulatory counsel for CATIC, New England's Bar-Related title insurance underwriter. Rich can be contacted at RHogan@CATICACCESS.COM.

Bureau of Consumer Financial Protection

The law:

- establishes the Bureau as an independent bureau within the Federal Reserve Board to become operational probably in the next six to 12 months;
- gives the Bureau broad authority to protect consumers from unfair or deceptive practices;
- assigns to the Bureau the responsibility for overseeing major consumer protection laws, including, among others, the Real Estate Settlement Procedures Act (RESPA); the Truth in Lending Act (TILA); the Homeownership and Equity Protection Act (HOEPA); the Home Mortgage Disclosure Act (HMDA); the Fair Credit Reporting Act (FCRA); and the Equal Credit Opportunity Act (ECOA). On the designated transfer date, all consumer financial protection functions will be transferred to the Bureau from the Federal Reserve; the Office of the Comptroller of the Currency (OCC); the Office of Thrift Supervision (OTS); the National Credit Union Administration (NCUA); the Federal Deposit Insurance Corporation (FDIC); and The Department of Housing and Urban Development (HUD); and
- requires the Bureau to issue, within one year of the transfer date, a proposed rule containing model disclosures combining disclosures required under TILA and Sections 4 and 5 of RESPA.

A provision in the law imposes civil penalties for violating consumer financial laws (including RESPA). Fines start at $5,000 per day but for willful violations can be as much as $1 million per day.

Exclusions from Bureau authority are provided for real estate brokers, persons regulated by state insurance regulators, auto dealers, accountants, tax preparers, and because of the efforts of REBA, in working with U.S. Rep. Barney Frank, attorneys "with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law."

Mortgage loan changes

The law requires federal regulators to issue rules to require "securitizers" to retain an economic interest of at least 5 percent of the credit risk in assets they securitize. Regulators must also establish a specific exemption from this requirement for "qualified residential mortgages" taking into consideration "underwriting and product features that historical loan per-

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Longing for local legal language – fast: Massachusetts-specific legal forms

By Donna M. Turley

About half my day is document-driven.

As a Boston lawyer with a practice focused on real estate, business law, probate and estate planning, I spend hours on legal documents.

I've tried several automated forms programs designed to make document drafting faster and easier. But most fall short — mainly because the forms aren't specific enough to Massachusetts law.

I've found what I needed in new automated forms collection from West. With Westlaw Forms Massachusetts, I get local content first and foremost, plus exceptional time savings, links to research sources and more.

A long-time REBA member, Donna Turley is a founding member of Glickman Turley in Boston. She concentrates her practice on real estate, finance, small business, nonprofits, estate planning, probate and animal law. Donna can be reached at dmt@glickmanturley.com.

Massachusetts-specific content and expertise

All automated forms programs are designed to generate documents fast. Unfortunately, those documents are often too generic. If you have to substantially revise your documents to comply with the specifics of Massachusetts law, you really don't save time.

The Westlaw forms were created by Massachusetts attorneys for Massachusetts attorneys. The thousands of forms in this collection are adapted from trusted and official local sources such as: West's Massachusetts Practice Series, including many forms edited by authors Patricia Annino, Marc Perlin, Hon. Sean Dunphy and Patricia Talty; The Real Estate Bar Association; Probate & Family Court; and Land Court.

Local forms make all the difference. Unlike other states, Massachusetts has adopted very few uniform codes; the law we deal with is unique. And if automated forms are going to be useful, they need to reflect Massachusetts law.

For example, many forms programs assume that married partners are opposite sex, and that presumption is built into the templates. In a state where same-sex marriage is legal, finding and replacing pronouns and changing references to husbands and wives takes valuable time. With Westlaw Forms, no such work is necessary.

Using local forms — REBA forms, for example, which are considered the real estate bar standard — also reduces malpractice exposure. In a dispute over a real estate document, everyone looks to REBA language as the accepted standard. Having REBA forms in my Westlaw Forms collection gives me confidence because I'm using the bar association language from the start.

You can also amend the templates using your own language so that your forms really are your own and contain the language you believe is important for all your clients.

Exceptional time savings

Time savings is the reason most attorneys consider an automated forms system in the first place. Most fill-in-the-blank electronic forms can prepopulate some information within the document you're working on, and they're often easy to e-file. But their ability to truly save you time ends there.

The amount of time you save with Westlaw Forms, however, can be measured in days.

Westlaw Forms isn't a fill-in-the-blank forms collection. Instead, it asks a series of questions and uses your answers to build your document. Built-in logic includes and omits questions based on your previous answers to customize your document.

Every time you create a document, the information you enter is saved in

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From an eagle ... to a duck

By Peter C. Norden

Peter Wittenborg invited me to write an article about how I went from a legend in the title business to an independent insurance agent in Florida. Well, many of you already know it is an interesting story, filled with intrigue and adventure. Unfortunately, that is all I will say about it.

As most of you know, I spent most of my career fighting for the concept of the attorney agent. Being a lawyer is no longer about being good at the practice of law. You have all been dragged kicking and screaming into the world of business and running a practice. Let's face it, that's not what they trained you for in law school. Through the years, I have discussed with each of you about the need to reconcile your books, to lock up your check stock, and most of all ... to be active in defending your profession.

Having left the title insurance industry, I looked around for something that I could do which would not violate my non-compete. During my search, I stumbled on the concept of supplemental insurance. I looked at this and realized that this was a product that I could use to help my former clients. Further research led me to Aflac.

I'm sure that most of you recognize the need for medical insurance to pay for doctors and hospitals when you get sick or injured. The problem is that the financial impact of these illnesses and injuries is not just the medical bills. Most families today are living pay check-to-pay check. Being out of work, even with the best medical insurance, can lead to financial hardship. A Harvard study showed that 75 percent of all the bankruptcies today

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A Florida resident, Peter Norden is renowned in the title insurance business. He retired in 2009. He can be reached at Peter_Norden@us.aflac.com.

BREAKOUT SESSIONS
Conflicts in Joint Representation

Emerging Technology for the Transactional Lawyer

Development in a Recession - Just when I knew all the answers, they went and changed the questions!

Title Insurance Claims 101

Unauthorized Practice of Law - REBA vs. NREIS: A Litigation Update

Recent and Pending Legislation: Summary and Highlights

Recent Developments in Massachusetts Case Law

CONTINUING EDUCATION COMMITTEE
Amanda S. Eckhoff, Co-Chair
Michael D. MacClary, Co-Chair

CLE CREDITS
New Hampshire and Rhode Island continuing legal education credit pending. More information to follow.

LOUNGE AREAS
Be sure to visit the lounge areas, located in the Nugget/Wellington Room and the Captain's Room of the DoubleTree Hotel. Refreshments will be served.

For information on becoming a sponsor or an exhibitor please visit www.reba.net.

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REBA
THE REAL ESTATE BAR ASSOCIATION for Massachusetts

2010 Annual Meeting & Conference

www.reba.net

The DoubleTree Hotel
5400 Computer Drive
Westborough, MA

REGISTRATION for REBA'S Annual Meeting & Conference

Complete this registration, include the appropriate fee and return to REBA Foundation, Attn: 2010 Annual Meeting & Conference, 50 Congress Street, Suite 600, Boston, MA 02109-4075, or fax to: (617) 854-7570.

You May also Register Online at www.reba.net

	By Nov. 1	After Nov. 1
❑ YES, please register me. I am a REBA member in good standing.	$ 195	$ 220
❑ YES, please register me as a guest. I am not a REBA member.	$ 235	$ 260
❑ NO, I am unable to attend, but would like to purchase the Conference materials and a CD of the sessions. (Order by 11/10/10. Please allow four to six weeks for delivery.)	$ 190	$ 190
TOTAL	$_____	$_____

❑ I have enclosed a check for the total amount listed above

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SELECT YOUR LUNCHEON: ❑ Petite Filet Mignon ❑ Stuffed Chicken en Croute ❑ Baked Scrod Mornay ❑ Spinach & Cheese Ravioli ❑ New England Baked Haddock ❑ No Lunch

BREAKOUT SESSION PREFERENCES:
Please rate (1-7) the order of your session preference. This information will help us to determine the most popular programs for space considerations. Registrants are not required to pre-register for sessions. Feel free to attend any session at any time.

_____ *Emerging Technology for the Transactional Attorney (Sifflard, Vetstein, Warshaw)*
_____ *Development in a Recession (Slater, St. Clair)*
_____ *Conflicts in Joint Representation (Gill, Markowski)*
_____ *Title Insurance Claims 101 (Camillo, Fortuna, Looney)*
_____ *Unauthorized Practice of Law - REBA vs. NREIS: A Litigation Update (Davis, Moriarty, Muldoon, Salvesen)*
_____ *Recent & Pending Legislation: Summary & Highlights (Bigelow, Goldberg, Hogan, Smith)*
_____ *Recent Developments in Massachusetts Case Law (Lapatin)*

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FROM WORCESTER: Route 9 East to Computer Drive/Research Drive Exit. Take a right at the first set of lights onto New Flanders Road; bear right onto Computer Drive, head straight through the third set of lights, drive 1/2 mile and the hotel is on the left at the top of the hill.

FROM STURBRIDGE: Mass Turnpike (I-90) East to Exit 11A, I-495 North to Exit 23B (Route 9 West) to Computer Drive/Research Drive Exit. Bear right at the end of the ramp, drive 1/2 mile and the hotel is on the left at the top of the hill.

FROM I-495 NORTH OR SOUTH: Exit 23B (Route 9 West) to Computer Drive Research Drive Exit, bear right at the end of the ramp. Drive 1/2 mile and the hotel is on the left at the top of the hill.

FROM CONNECTICUT: Route 84 North to Mass Turnpike (I-90) East to Exit 11A (Route 495), Route 495 North to Exit 23B (Route 9 West) to Computer Drive/Research Drive Exit. Bear right at the end of the ramp, drive 1/2 mile and the hotel is on the left at the top of the hill.

SCHEDULE OF EVENTS

7:30 a.m. — **Registration Opens**

7:30 a.m. - 8:30 a.m. — **Exhibitors' Hour**

8:30 a.m. - 1:15 p.m. — **BREAKOUT SESSIONS**

8:30 a.m. - 9:30 a.m.
9:45 a.m. - 10:45 a.m.
Autumn Room

Conflicts in Joint Representation
Robert T. Gill; Jennifer L. Markowski

You are asked to represent partners in purchasing a property, setting up a real estate trust and negotiating the construction loan from the bank. Is this a conflict? If so, it is a waivable conflict? How exactly do you get valid consent? It's all in Mass. R. Prof. Conduct 7.1. Come and find out!

8:30 a.m. - 9:30 a.m.
Chandler/Edgewood Room
11:00 a.m. - 12:00 p.m.
Baldwin Room

Emerging Technology for the Transactional Lawyer
James A. Sifflard; Richard D. Vetstein; George J. Warshaw

Leaders of the recently-launched REBA Technology Committee will discuss
data security law compliance issues, disaster planning and recovery and technology infrastructure in today's fast-changing marketplace. Jim Sifflard of First American Title Insurance Company is an acknowledge market leader in counseling solo practitioners and small firms on the feasible implementation of new technology. Richard Vetstein is a pioneer in the use of social media for business development and internet identity. George Warshaw will lead a discussion on document management. The program will focus on realistic and budget-conscious technology solutions for real estate and transactional lawyers.

8:30 a.m. - 9:30 a.m.
9:45 a.m. - 10:45 a.m.
Baldwin Room

Development in a Recession - Just when I knew all the answers, they went and changed the questions!
Daniel St. Clair; John J. Slater, III

Panelists Daniel St. Clair and Jack Slater will discuss the challenges of land development in the most significant economic downturn in a generation. The panelists will explore a variety of issues facing real estate development in today's economic climate. These include legacy entitlements secured during better economic times (and the resulting unrealistic mitigation burdens); the advantages of the permit extension provisions of recent economic development legislation; key characteristics of development deals that are successfully moving forward; the effects of the once-frozen (now thawing) capital markets; and the burdens of extensive documentation now required to secure financing.

8:30 a.m. - 9:30 a.m.
Viking Room
11:00 a.m. - 12:00 p.m.
Autumn Room

Title Insurance Claims 101
Joseph A. Camillo, Jr.; Margaret M. Fortuna; Thomas M. Looney

Have you ever submitted a claim to a title insurer? Whether you have never submitted a claim or are a serial claim filer, this program is for you. Our panel of title insurance practitioners, including both inside and outside counsel, will discuss the nuts and bolts of filing a claim, the life cycle of certain typical claims, and some tips for claims avoidance. You will gain a better understanding of what information should be provided to the title insurer at the inception of a claim, and you may be surprised to learn who is covered by title insurance (and maybe more importantly, who isn't).

9:45 a.m. - 10:45 a.m.
11:00 a.m. - 12:00 p.m.
Chandler/Edgewood Room

Unauthorized Practice of Law - REBA vs. NREIS: A Litigation Update
Jon S. Davis; Douglas W. Salvesen; Thomas O. Moriarty; Robert J. Muldoon, Jr.

REBA's signature unauthorized practice of law action against National Real Estate Information Services (NREIS) has been referred by the US Circuit Court to the SJC. Doug Salvesen, long-time counsel to REBA's Practice of Law by Non-Lawyers Committee will discuss the case, report on oral argument before the SJC and respond to member questions. REBA President Tom Moriarty will discuss the association's coalition-building process with amicus brief allies including sibling bar associations. Legal legend Bob Muldoon, who has represented the Massachusetts Bar Association as an amicus curiae at every stage of this litigation, will offer commentary. Jon Davis, who has led REBA's unauthorized practice of law strategy since the early 1990's, will moderate. This program is a 'must' for anyone concerned about the future of residential or commercial real estate practice in Massachusetts.

9:45 a.m. - 10:45 a.m.
11:00 a.m. - 12:00 p.m.
Viking Room

Recent and Pending Legislation: Summary and Highlights
Michael J. Goldberg; Richard A. Hogan; Erica P. Bigelow; Edward J. Smith

The Legislature concluded its two-year formal session this summer with a flood of legislation affecting real estate practice. These include permit extensions, revisions to REBA's landmark 2006 mortgage discharge law, changes in registry of deeds practice, new foreclosure legislation, and many others. Informal sessions continue to bring new bills to enactment in this busy election year. Don't miss this legislative update with REBA's long-time legislative counsel Ed Smith and Legislation Committee members.

12:15 p.m. - 1:15 p.m.
Chandler/Edgewood Room

Recent Developments in Massachusetts Case Law
Philip S. Lapatin

Now in his 31st year at these meetings, Phil continues to draw a huge crowd. His session, Recent Developments in Massachusetts Case Law, is a must hear for any practicing real estate attorney. Last year Phil received the Association's highest honor, The Richard B. Johnson Award.

1:20 p.m. - 3:00 p.m. — **LUNCHEON PROGRAM**

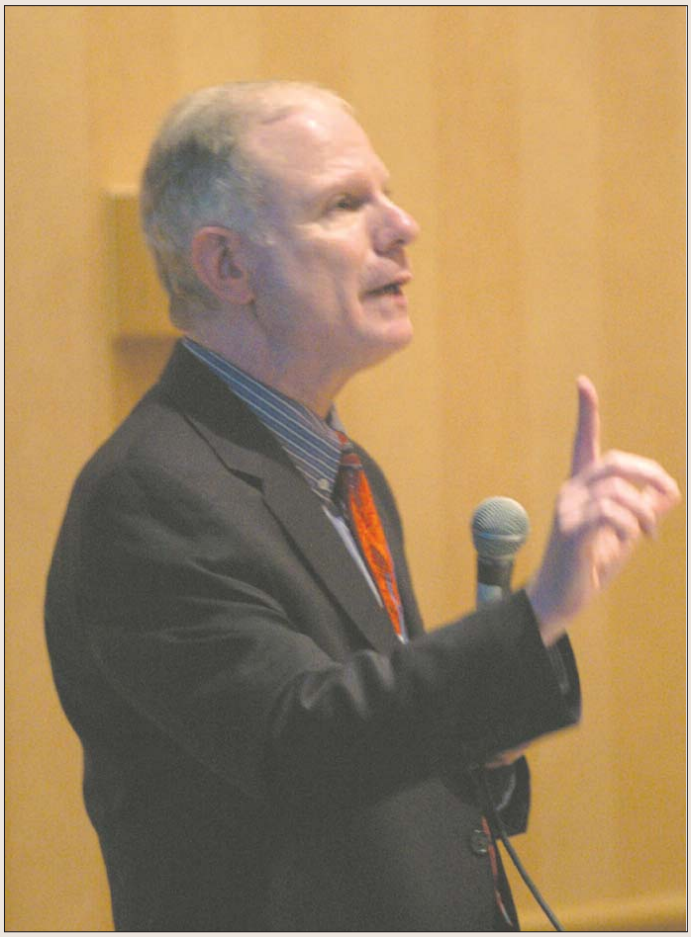
1:20 p.m. - 1:30 p.m. — **Recognition of Haskell Shapiro**

1:30 p.m. - 2:15 p.m. — **REBA President's Welcome & Remarks and NREIS Litigation Q & A**
Thomas O. Moriarty, President and Douglas W. Salvesen, REBA Counsel

2:15 p.m. - 2:45 p.m. — **REBA Business Meeting**

2:45 p.m. — **Adjournment**

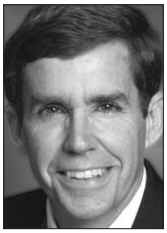
2010 Spring Conference



REBA members and guests at the 2010 Spring Conference heard Phil Lapatin lecture on recent developments in Massachusetts case law. Lapatin, now in his 31st year as a speaker at REBA's twice-yearly meetings, will address attendees at the association's 2010 annual meeting on Monday, Nov. 8, at the DoubleTree Hotel in Westborough. To register, go to www.reba.net.

The view from the recording counter – summer 2010

By Richard P. Howe Jr.



When summer vacations leave the registry thinly staffed, I often find myself helping at the recording counter. With this day-to-day exposure to incoming documents fresh in mind, I thought it might be useful to share some observations from our side of the recording counter.

When a document is presented for recording, we look for a number of things. Is the property located within this registry district? With two registries in the same county, customers often send their document to the wrong place.

Next we check for a title reference on the document. This allows us to identify the property as registered or recorded land. In an age of laser printers and high-end scanners, determining whether a document is an original can be a challenge. Thankfully, we have moved beyond the lick-the-finger-and-smudge-the-signature test and now rely solely on a visual inspection to determine the originality of a signature. The only copies we will record are those certified by another registry or by another governmental entity.

Whether a document is acknowledged is also on our checklist, although what constitutes a sufficient acknowledgement is sometimes difficult to determine. The Massachusetts Deed Indexing Standards specifically state that "failure to comply with the strict requirements of Executive Order 455 [regarding Notary standards] shall not prevent a document from being recorded," although the indexing standards do require at least the original signature and printed name of the notary along with the expiration date of the notary's commission plus some language indicating "that the parties intended such signature to constitute an acknowledgement." A May 2009 bankruptcy court decision, *In re Giroux* (U.S. Bankruptcy Court, 08-14708-JNF), raised an additional issue regarding the sufficiency of the acknowledgement clause. In that case, the notary failed to insert the name of the person signing the document in the blank space of the "Then personally appeared _____ and acknowledged … " section of the acknowledgement. The court held that the omission invalidated the acknowledgement and that the mortgage was void. As a result of this decision, we now will reject documents that have a similar omission.

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Several years ago there was much discussion regarding document formatting standards. The initial version established minimum font size, spacing and margin width, but such specific standards were unworkable and so the standard became more practical: "sufficient to be reproduced on standard registry scanners" about sums it up.

Two rules that are strictly enforced are bans on double-side print and documents printed on non-white paper. Last summer we recorded a death certificate that featured a watermark of the word "COPY" embedded throughout the document. Whether it was scanned or photocopied, these watermarks obscured all of the information contained on the certificate, rendering it unreadable. Since it was a document prepared by another government agency, I went ahead and recorded it; to do otherwise would have placed the customer in an impossible position. In this case, we retained the original document for future inspection by researchers. Hopefully whichever agency produced the thing in the first place quickly realized it was a bad idea and eliminated the obscuring watermark.

Documents written in a language other than English present a problem. I require the person trying to record the document to present a written English translation along with an acknowledged certificate signed by the translator containing facts about the translator's education, training and experience. Recording-wise, the translation, the certificate and the original foreign language instrument stay together as a single document.

Computing the deeds excise tax due is not always straightforward. With the economy slumping, deeds in lieu of foreclosure are appearing with some frequency. On a deed in lieu, the tax liability is based on the amount of the debt being forgiven plus any additional consideration. The amount forgiven must be expressly stated on the deed. For example, if a person owes $200,000 and simply executes a deed to the lender, the consideration would be $200,000.

A sale that involves a governmental entity on either side of the transaction is exempt from the transfer tax, with the term "governmental entity" being broadly construed. For example, where a charter school purchases property, the sale is exempt from the deeds excise tax because the charter school is considered to be a public school. One transaction that is not exempt from the deeds excise tax is the transfer of an interest in real estate from one spouse to another pursuant to a divorce.

Tax liability also arises with the sale of a beneficial interest in a nominee trust even though no document would be recorded at the registry of deeds. In such a case, the seller may purchase an excise tax stamp at the registry and affix it to the applicable document, even though that document is not to be recorded. Finally, if a tax stamp is erroneously affixed to a document, the person who has overpaid the tax may apply to the Department of Revenue for an abatement, just as would be done with any other type of tax.

These issues may seem trivial in the grand scheme of a real estate practice, but they represent the type of things that could prevent your documents from going on record at the registry of deeds in a timely manner. By sharing these observations, I hope to reduce the likelihood of that happening.

Having served for nearly 15 years as register at the Middlesex North District Registry of Deeds in Lowell, Dick Howe is a frequent and welcome contributor to these pages. You can follow his blog at www.lowelldeeds.com and contact him at Richard.howe@sec.state.ma.us.

New environmental laws and regulations affect your real estate practice

By Gregor I. McGregor

New laws this year, in the form of court decisions, agency regulations, and state statutes, affect the use, value, transfer and liability of real estate. Many more are pending.

Of immediate interest is the Economic Development Reorganization Act, just signed by Gov. Deval L. Patrick. This is chapter 240 of the acts of 2010. Section 173 confers a two-year extension on a long list of state and local land development-type permits and other approvals and determinations of rights that were in effect or existence between Aug. 15, 2008, and Aug. 15, 2010. For a new property or project owner to enjoy an extension, however, he or she must abide by the prior commitments made in the permit or approval.

This right-to-extension includes approvals granted under the Zoning Act, Subdivision Control Act, Wetlands Protection Act, MEPA and Chapter 91, as well as under local bylaws and ordinances. This does not include, however, federal permits, 40B permits, enforcement orders, or hunting-fishing-aquaculture permits.

Section 71 of the same act requires review of proposed regulations for their impacts on small businesses.

The Supreme Judicial Court decided *Arno v. Commonwealth* on Aug. 2, ruling that registration of land does not extinguish the public's rights in filled tidelands. REBA had submitted its brief amicus curiae. Specifically, the SJC held, after extended exposition of the land registration system viz. the waterways statutes as regards private versus public rights:

"Whatever its intended effect, neither the Land Court (in 1922) nor the Attorney General had the authority to divest the public of its rights in Arno's parcel. As we explain, regardless of whether Arno's parcel consisted of filled tidal flats or filled submerged lands, only an act of or an express delegation by the Legislature could extinguish the public's rights in the parcel. Moreover, under the terms of §46 of the Registration Act, it was not necessary to include them in the registration certificates issued by the Land Court in 1922. Accordingly, in response to Arno's petition to clarify the meaning of his certificate of title, the judge should have concluded that Arno's title remains impressed with public rights. … Because this case concerns only the exercise of public rights through the application of the Waterways Act to Arno's parcel, we need go no further. Even under the terms of the Registration Act, those rights survived registration of Arno's parcel despite their omission from the registration certificate."

On the hazardous waste front, decisions from both the SJC and U.S. Supreme Court teach lessons on recovering costs on account of releases of oil or hazardous material.

In *Bank,* the SJC held that attorneys' fees incurred to respond to releases of hazardous materials are recoverable under the Mass. Superfund (21E) as "response" costs, just like costs for licensed site professionals or other environmental consultants. The attorneys' fees for the litigation itself, however, were not recovered as "response" costs, but rather awarded under separate provisions. It is critical to differentiate the types of recoverable costs, track them carefully, and justify them.

In *Burlington Northern*, the U.S. Supreme Court dealt with the relative liability of parties under the Federal Superfund ("CERCLA"), ruling that "apportionment" is proper if there is proven a reasonable basis for determining the contributions to a single harm. The railroad's liability was only 9 percent, based on factors such as the relevant area the railroad controlled, the time the railroad was present, and the nature of the railroad's contribution to the waste.

By the way, in *Eskanian v. DEP*, the Appeals Court stated the obvious but important principle that MassDEP is not required under 21E to give notice to owners and operators each time they fail to file a document at each phase of environmental cleanup efforts. Further, the role of the Licensed Site Professional is to advise and guide cleanup efforts as a quasi-governmental worker; hiring the LSP does not symbolize that the response action is concluded or that the responsible party is no longer strictly liable.

On the taxation front, the Land Conservation Incentives Act will take effect Jan. 1, 2011. Landowners will receive a state income tax credit if they donate conservation land to a municipality, commonwealth or certain private nonprofit corporations working on land conservation. Land donated must be qualifying conservation land and the tax credit is valued at 50 percent of the fair market value of the gifted land.

On the tidelands and waterways front, the SJC ruled in *Moot v. DEP*, known as *Moot II,* that curative amendments to Chapter 91 did not illegally exceed the Legislature's authority by extinguishing and relinquishing public trust rights in landlocked tidelands. The net result is that MassDEP's long-standing landlocked tidelands license exemption has been reinstated, but a Chapter 91 license may trigger a benefit statement and analysis called a Public Benefit Review. While this PBR mechanism is only for projects requiring an ENF or EIR under MEPA, and therefore does not cover all landlocked tideland projects, it preserves enough MassDEP oversight of public rights sufficient to satisfy the SJC.

Massachusetts made news promulgating the nation's first ocean management plan at the end of 2009. It sets guidelines to manage, review and permit uses of state waters. As the Ocean Plan has the force of law under the Massachusetts Oceans Act, it goes beyond "ocean spatial planning" to be "ocean spatial management." Specifically, the Plan, like the Act, governs state coastal waters at least 0.3 nautical miles seaward of mean high water (excluding most developed harbor and port areas) out to the three-mile limit of state legal control.

Within that water area, the Ocean Plan creates management categories: Prohibited, Multi-Use, and Wind Energy Area. This promotes offshore renewable energy development by opening up access to the wind and other sources, formerly prohibited in most state waters.

On the energy front, the SJC in *Hoosac Wind* upheld MassDEP's approach to permitting open-bottom culverts for stream crossings. This case came before the SJC on an important land-based wind power project of 20 turbines to generate 30 megawatts on two Berkshire ridges in Florida and Monroe, which approved and supported the project. Hoosac Wind in 2003 filed its permit applications for this inland project (not to be confused with Cape Wind).

It took this long for the state Wetland Protection Act permit to be litigated through MassDEP and the Trial and Appeal Courts. The roads constructed to the turbine locations meet the MassDEP standards by adopting open-bottom stream-crossing culverts to avoid altering the banks of 10 of 12 streams (the other two crossings also meet MassDEP's performance standards). This newer, preferred technique is treated as a Buffer Zone project.

Incidentally, wind energy siting legislation passed both houses of the Legislature, but was not enacted by the close of the session. This is progress toward the state mapping good wind locations, following predictable procedures, issuing clear criteria, creating municipal wind energy permitting boards and reviewing them with some limited state override, all in the interest of more expeditious, less contentious proceedings and better siting and construction of wind turbines. The bill is expected to pass next session.

Meanwhile, there are many more changes coming that will affect real estate in Massachusetts.

On the wildlife front, the state has proposed changes to the Massachusetts Endangered Species Act regulations. Among them are a public comment process for updates to the Priority Habitat maps delineating rare and endangered species habitat; a more comprehensive approach to conserving species of special concern through development of statewide conservation plans; and more regulatory flexibility to project proponents through expanded grandfathering and exemptions, and by providing performance standards.

There is also the far-reaching draft plan of the Climate Protection and Green Economy Advisory Committee to meet the 2020 and 2050 goals of the Global Warming Solutions Act. The most aggressive option, which garnered wide support, is adoption of the 2020 target to reduce GHG emissions by 25 percent below 1990 levels. The comment period for the draft implementation plan for the first phase (a cost-effective approach) closed on July 15. The official 2020 target and the plan for achieving that target are required to be established Jan. 1, 2011.

Regarding land conservation, the long-pending Public Lands Preservation bill,

Continued on page 19

Greg McGregor is principal at the Boston-based environmental law and litigation firm McGregor & Associates. He co-chairs REBA's Environmental Committee and an annual real estate law seminar at the National CLE Conference. REBA is grateful to the New England Real Estate Journal where portions of this article were published. Greg can be contact at gimcg@mcgregorlaw.com.

Longing for local legal language – fast: Massachusetts-specific legal forms

Continued from page 8

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Westlaw Forms Massachusetts links to Westlaw content such as Massachusetts Practice Series materials, Massachusetts General Laws Annotated, Massachusetts Court Rules, CLE materials, USCA, CFR, and more.

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Legislation clarifies recording requirements at registries of deeds

Continued from page 6

same day. Common practice amongst conveyancers when they cannot present important papers to the registry in person is to arrange to deliver or overnight the package to a title examiner. The title examiner will then present the papers in person, be available to correct minor issues and confirm that the recording takes place as expected.

The U.S. Postal Service and Federal Express have traditionally been reserved for those instruments, such as assignments and discharges, that don't require oversight or timely recording. The court, however, stated that "Compelling a lien claimant to deliver its complaint in hand would impose an unreasonable requirement."

The court recognized that "a party seeking to perfect a mechanic's lien is not physically capable of recording the document itself." The task of recording lies solely with the register of deeds, who "also has the responsibility for timely recording." Acknowledging that the Blumes had been served with a summons and copy of the complaint and didn't dispute receipt of actual notice, the court stated that "National did everything it could to achieve the requisite recording, was not obligated to follow up or supervise the performance by registry officials of their duty to record the instrument in a timely manner, could properly presume that those officials would perform their duties in accordance with their statutory obligations, and did not lose its lien as a result of those officials' failure or neglect of duty."

Perhaps realizing that lawyers and title examiners standing at the recording counter will be staring at the register's mail pile with great unease, the court added the following comments in footnote 10: " … we observe that the underlying objective of the recording aspect of the statute was not thwarted in the instant circumstances. … There was no suggestion of any third party being prejudiced or misled by lack of notice during the fourteen days that the complaint did not appear on the registry's books." We are left with the implication that had the priority of an innocent third party been jeopardized, the court may have reached a different result.

Needless to say, the registers of deeds felt that the holding in National Lumber created unreasonable burdens for their registry staff and made presumptions about the common practices of conveyancing attorneys that didn't hold true. Real estate practitioners have never been uncomfortable with the custom of presenting important documents to the registry staff by hand, either their own or those of their title examiners.

In an effort to seek a resolution, the Massachusetts Registers of Deeds and Assistant Registers of Deeds Association approached REBA and suggested a revision to G.L.c. 36 §14 making it clear that no instrument will be considered recorded until it is actually stamped with an instrument number or book and page.

G.L. c. 36 §14, which is the section that creates and addresses what we have historically referred to as the "daily sheets," was enacted in 1830 and last revised in 1902. In its current form it requires the registers to maintain a "book" with specific columns of information. We recognized the need to address more than the *National Lumber* issues and a joint effort of REBA and the Massachusetts Registers of Deeds and Assistant Registers of Deeds Association produced the following Senate bill, was signed into law by Gov. Deval L. Patrick on Aug. 10th and will be effective 90 days thereafter:

Chapter 298 of the Acts of 2010 — An Act to Clarify Recording Requirements at Registries of Deeds

SECTION 1. Chapter 36 of the General Laws is hereby amended by striking out section 14, as appearing in the 2008 Official Edition, and inserting in place thereof the following section:

Section 14. Each register shall keep a record, in book or electronic form, into which the register shall enter recording information for all instruments accepted for record, in the order in which they are recorded. Upon recording of an instrument, the following information shall be entered into the record: the day, hour and minute when the register assigns an instrument number, or book and page number, so assigned; the names of the grantors and grantees in the instrument; and the city or town in which the land lies. No instrument received by the register shall be considered recorded until the register assigns to the instrument and instrument number, or book and page number, as the case may be.

Any change or correction made to the record shall be accessible to the public in the particular registry district in which the affected land lies. Such change or correction shall be maintained by the register as part of the record for public inspection during registry business hours at each office in the registry district. Any change or correction to the record shall document the nature and date of the change or correction.

Obama Signs H.R. 4173, designed to restore American financial stability

Continued from page 7

formance data indicate result in a lower risk of default."

Creditors are prohibited from making residential mortgage loans unless the creditor makes a good faith determination, based on verified and documented information that, at the time the loan was consummated, the consumer had a reasonable ability to repay the loan. The law allows any creditor and any assignee or securitizer of a "qualified residential mortgage" to presume that the loan met the ability to repay requirements, although the presumption is rebuttable.

"Qualified Mortgage" is defined in the law as any residential mortgage loan with the following characteristics:

- Regular periodic payments do not result in an increase in the principal and, except for balloon loans under specified circumstances, do not allow borrower to defer principa;
- Does not include a balloon payment that is twice as large as the average of earlier scheduled payments (with some exceptions);
- Income and the financial resources of the consumer are verified and documented;
- For fixed rate loans, the underwriting is based on a payment schedule that fully amortizes the loan over the loan term and takes into account all applicable taxes, insurance, and assessments;
- For adjustable rate loans, underwriting must be based on the maximum rate permitted under the loan during the first five years and take into account all applicable taxes, insurance, and assessments;
- Complies with guidelines or regulations established by the Bureau relating to ratios of total monthly debt to monthly income or alternative measures of ability to pay regular expenses after payment of total monthly debt, taking into account the income of borrower and such other factors as the Bureau determines to be relevant;
- Total points and fees payable in connection with the loan do not exceed 3 percent of the total loan amount;
- The loan term does not exceed 30 years, except under limited circumstances established by the Bureau, such as in high-cost areas;
- In the case of a reverse mortgage, the loan meets the standards set by the Bureau;

Mortgage broker compensation

The law establishes new prohibitions on yield spread premiums and other compensation to mortgage brokers that is based on the loan rate. Compensation to the mortgage broker may be based on the principal amount of the loan, however, and may be financed through the loan so long as the compensation is not based on the loan's rate and terms.

Pre-emption

The law allows states to impose stricter consumer protection laws on national banks, as compared with the federal standard. National banks could seek exemption from a state law if the law prevents, significantly interferes with or materially impairs a federal bank's ability to do business — a higher bar than is currently in place. State attorneys general are given the authority to enforce certain rules issued by the Bureau.

Deposit insurance

The law permanently increases the level of federal deposit insurance for banks, thrifts and credit unions to $250,000, retroactive to Jan. 1, 2008.

Conclusion

This piece of legislation will bring about enormous changes to the way that mortgage lending is conducted in this country. A new regulatory body has been created and given strong powers to protect consumers. The Bureau will enforce RESPA and other federal consumer laws and has the authority to levy millions of dollars in fines. REBA will continue to monitor the implementation of this legislation.

From an eagle ... to a duck

Continued from page 9

are caused by medical bills. *5 percent of those people thought they had excellent insurance. Aflac provides for more than 50 million people worldwide the peace of mind of knowing that they can make the decisions to provide the support for loved ones in their time of need.

So much for the commercial. Why does this help you? The bottom line is that the practice is a business. You all know how hard it has been for the conveyancer in the last few years. Business is down, you can't raise your fees, and title insurance companies are cutting the splits. You have cut your staffs to the bone and are looking for some way to keep and incent your good staff. Most of you also know that when the business comes back (and it will), your competition will try to hire away your key people. You also know that your health care costs are going up. How do you deal with all these variables?

Aflac's policies allow you to provide extra coverage for your employees at a reduced rate to them, at no cost to you. Furthermore, you as an employer will actually get some tax relief on your FICA. The average Aflac policy costs no more than a cup of Starbucks coffee per week. We provide accident, cancer and hospitalization policies. We also have short term disability, dental and vision plans. The key to remember here is the cost to the business: nothing.

Aflac has been recognized as the most ethical insurance company in the U.S. for four years running by Ethisphere Magazine. I myself have witnessed how fast claims are paid. Furthermore, supplemental insurance is not covered by the new healthcare legislation, so you do not have to worry about uncertainty. Finally, Aflac has never raised its premiums in 55 years, but has added coverage at no charge.

I will be at the annual REBA meeting with Evan Cross from our local office. Please stop by, say hello and let us show you what we can do for you. You might even win a talking duck.

Last, but not least, I urge you to come to the meeting and join me in honoring my friend and colleague of many years, Haskell Shapiro.

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We make the practice of real estate law look too easy

Continued from page 5

pointed officials with no prerequisite training or experience. We appreciate that almost every board is comprised by a few members who are attorneys, engineers or other trained professionals … but we all run into the board members who are no more qualified to interpret a zoning by-law than they are qualified to coach a professional baseball team.

The exceptions to the rule are the board members with uncanny common sense who have been in town most of their lives and know where the bodies are buried. Those board members are tougher than any judge. I have seen brilliant litigation-types come out to the suburbs and attempt to advocate for their clients as if they were arguing in Appeals Court, and I have seen them crash and burn. One, in particular, was so dramatic that the story was recounted in Time magazine.

On the other hand, I enjoy watching local counsel find the balance between seeking proper application of the law and appreciating the real and imagined concerns of the local community. Unlike the litigator, local counsel cannot draw blood. Arrogance will hurt his/her client's case and it will ruin counsel's reputation in future matters. In other words, it isn't as easy as it looks.

REBA launches Technology Committee

Continued from page 1

ny, is an acknowledged industry leader in advising transactional lawyers on data security law compliance issues, disaster planning and recovery, electronic document management and technology infrastructure.

Richard Vetstein is the founding partner of Framingham-based Vetstein Law Group and TitleHub Closing Services in Needham. He is the creator of the widely-followed Massachusetts Real Estate Law Blog and a pioneer in the use of social media for business development and professional marketing.

The committee will chair an hour-long break-out session at REBA's Annual Meeting and Conference on Monday, Nov. 8, entitled "Emerging Technology for the Transactional Lawyer." Jim, who will lead a discussion of technology issues facing the real estate lawyer, can be reached at jsifflard@firstam.com. Richard, whose focus is social media and core Internet presence, can be contacted at rvetstein@vetsteinlawgroup.com.

REBA members who wish to join the committee should contact Andrea Hardy at Hardy@reba.net.

'Appropriate conditions' under Chapter 40B

Continued from page 4

plan, size or shape, or building materials as are consistent with the terms of this section."

In the board's opinion, the "including but not limited to" opened the door to any type of condition reasonably supported to address local concerns. Applying the rules of statutory construction, the court held that the board was limited to conditions that "must fit within the same kind or class of local concern or issues that the examples address."

The developer was entitled to challenge conditions relating to financing and regulatory documents because these financial concerns would be addressed by MassHousing or DHCD and thus beyond the scope of the board's authority under section 21.

Furthermore, the board argued that under *Board of Appeals of Woburn v. Housing Appeals Comm.,* 451 Mass. 581 (2008), in cases where the comprehensive permit was approved, the HAC's review was limited to the determination of whether the developer had proved that board's conditions made the project uneconomic and, if the conditions did have that effect, whether the local board had met its burden that the conditions were necessary to address local needs. Because the HAC's decision was essentially based on the pleadings alone, without a review of local needs, the board argued that the HAC could not delete or modify any of the conditions to the permit.

The court reviewed the legislative intent behind chapter 40B, which essentially encourages the development of low and moderate income housing by establishing a streamlined permitting process. Following the board's interpretation of the HAC's authority under section 23, would, in the court's view, require a dual system of review — one through the HAC to determine whether a condition was uneconomic and a second action in Superior Court to determine whether the board had the authority to set the conditions in the first place. "Such inefficiency is not consistent with the purpose of the statute, and an interpretation that embraces it should be avoided."

While some may interpret this decision as a loss for cities and towns, the court did remand the case back to Superior Court and to the HAC to clarify its treatment of the conditions challenged by the developer. The decision does not change the balancing test established in the Woburn case but it does provide clear guidance on the issues that are properly before the local board.

REBA to Honor Haskell Shapiro at November annual meeting

Continued from page 1

examination in general for nearly 60 years.

Beginning 38 years ago at Lawyers Title Insurance Corporation, then at Commonwealth Land Title Insurance Company and finally at First American Title Insurance Company, Haskell Shapiro defined the role of title attorney in the unique environment of conveyancing practice in Massachusetts and New England.

For Haskell, agents and customers who called in were not supplicants seeking short answers cast in stone; they were professional colleagues expecting a reasoned discussion of the facts and circumstances of the particular title conundrum of the day. Haskell treated calls, however insignificant, with professionalism — and more, with personal warmth, because many callers were friends and acquaintances of long standing (even those he would not recognize on the street, because he knew them only by telephone) and he knew that even first-time callers were future friends and acquaintances.

Haskell's customers ran the gamut from brand new attorneys just figuring out the basics to sophisticated commercial practitioners, from sole practitioners in small towns to the biggest high-powered downtown firms in Boston. Haskell knew that by the time a fact pattern or a question of law or underwriting reached him, it very likely would have been refined and developed so that the easy parts had been resolved. Haskell relished the role of problem-solver and carried it out with panache.

It has been a long journey, from selling Studebakers on his father's lot, to a law school career accelerated by the Korean War, to a stint in the Army in Germany, to journeys across Massachusetts searching titles for the expanding Massachusetts highway system, to corporate life among the title insurers. After a decade with Lawyers Title, he was the obvious choice to provide immediate credibility and success for Commonwealth Land Title when it decided to open its Boston branch. Along the way, he became the role model for a generation of title attorneys.

The journey has taken him, as it has taken many of us, from Selectric typewriters and carbon paper to e-mails and pdfs. Haskell's adaptability (on occasion under protest) has taken him from nonstop dictation to a brace of secretaries through fax machines and overnight mail to computers, the Internet, and the eternal barrage of e-mail that characterizes our profession today.

For those of us who have grown up in the industry, it is difficult to imagine the day when we cannot say, "Call Haskell — he will know what to do."

A member of REBA's Title Standards Committee, David Merrill has spent virtually his entire professional life in the Massachusetts title insurance industry. He is Vice President and Senior Underwriting Counsel at Commonwealth Land Title Insurance Company. David's email address is David.Merrill@fnf.com.

Legislature revamps foreclosure procedures

Continued from page 1

within 30 days to a written offer to negotiate loss mitigation options, the lender may use a 90-day notice instead of a 150-day notice.

The 150-day right-to-cure notice is required once during any three-year period, so that if a borrower reinstates and then defaults on the mortgage again, the notice requirements for subsequent breaches within three years would be governed by the terms of the mortgage contract rather than the statute.

In addition to the change in timing, the new statute also creates additional disclosure requirements within the body of the notice. Most notably, the letter must now include a declaration informing the borrower of the importance of the letter and the need to have the letter translated. The statute requires that the lender include the declaration in the language the lender has regularly used in communications with the borrower.

The statute now also requires that the notice be sent by regular and certified mail to the borrower's mailing address. The previous version of the statute did not specify mailing requirements.

The Legislature included a sunset provision in the bill. After Dec. 31, 2015, yet another revised version of G.L.c. 244, §35A will take effect, reinstating the 90-day right-to-cure period but retaining the revisions regarding disclosures and mailing requirements.

In addition to the changes to the statute regarding pre-foreclosure notices, S 2407 also created G.L.c. 186A, "Tenant Protections in Foreclosed Properties." The new chapter places significant new limitations and obligations on lenders that purchase properties at their own foreclosure auctions.

The new law restricts lender-owners from evicting tenants occupying property pursuant to a bona fide lease or tenancy at will without having just cause or a binding purchase and sale agreement to sell the property to a third party. Within 30 days after a foreclosure sale, the lender-owner must post a notice giving contact information for the lender-owner, building manager or other representative as well as the address to which rent or use and occupancy must be sent.

After the notice is posted, the lender-owner can evict a tenant for the following just cause reasons: committing a nuisance, causing damage, interfering with the quiet enjoyment of other tenants, using or allowing the unit to be used for illegal purposes or refusing reasonable access to the lender-owner. The lender-owner must wait 30 days after the notice is posted before evicting a tenant for the following just cause reasons: failure to pay rent or use and occupancy, materially violating an obligation of the tenancy and failing to cure the violation after 30 days' written notice or refusal to renew a written lease after expiration.

The law also prevents eviction, even where just cause exists, if the lender-owner fails to deliver to each tenant a written disclosure of the tenant's right to a court hearing before eviction. This notice must be delivered at the same time as the contact information is posted. The notice must also be mailed by first-class mail to each unit and slid under the door of each unit.

In the event that the lender-owner believes the amount of rent or use and occupancy being paid by the tenant is unreasonable, the lender-owner must bring a claim in District, Superior or Housing Court seeking to establish a new, reasonable use and occupancy rate. The statute provides a presumption of reasonableness for any rental amount set forth in a bona fide lease.

Violation of the provisions of G.L.c. 186A is punishable by a fine of not less than $5,000.

Because S 2407 was enacted with an emergency preamble, its provisions pertaining to the 150-day right-to-cure notices and post-foreclosure tenants' rights took effect immediately upon Gov. Deval L. Patrick's signature of the bill on Aug. 7. As stated in a FAQ on its website, the Massachusetts Division of Banks interprets the new law as applying only to those loan defaults where a right to cure notice was sent after the governor signed the bill. Thus, if a lender sent a 90-day notice on Aug. 1 in compliance with the statute as it then existed, that lender would be entitled to initiate foreclosure after the 90-day period expired.

A member of REBA's Legislation Committee, Fran Nolan manages the foreclosure practice at Newton-based Harmon Law Offices. Fran is a frequent faculty panelist on continuing legal education programs relating to real estate foreclosure law and practice. He can be contacted at fnolan@harmon law.com.

Massachusetts mortgage discharge law updated

Continued from page 1

ing information from a governmental or quasi-governmental database.

(NOTE: REBA Title Standard No. 76 provides a method for recording evidence from an electronic data source that would comply with the new definition of "Mortgagee". REBA Title Standard No. 76 is available on REBA's website, http://www.reba.net.)

2) Section 54C(a)(3)(B) of G.L.c. 183 of the new Mortgage Discharge Act provided for the recording of an affidavit from the owner of real property encumbered by an undischarged mortgage to discharge that mortgage by affidavit if the original mortgagor no longer owns the encumbered real estate and cannot be located.

The 2010 technical correction bill deletes the words "cannot be located" from the statute, to expand the ability of the real estate owner to record an affidavit to discharge a mortgage when the mortgagor can be located, but will not cooperate.

3) The 2006 Act expanded the authority of an officer of an entity holding record title to a mortgage to sign documents without a recorded vote, provided that the signature has a valid acknowledgement. In G.L.c.183 § 54B, the authority of an officer went beyond a discharge, partial release, or assignment to include a subordination, non-disturbance, recognition, or attornment agreement, a power of attorney, or any instrument in a foreclosure action.

The 2010 Act clarifies which documents were intended by the statute's update, and expands the power of an officer of the entity holding record title to a mortgage to sign, without a vote, "any instrument for the purpose of foreclosing a mortgage and conveying the title resulting therefrom, including, but not limited to, notices, deeds, affidavits, certificates, votes, assignments of bids, confirmatory instruments and agreements of sale; or a power of attorney given for that purpose or for the purpose of servicing a mortgage."

4) The provisions for judicial discharge in Section 15 of G.L.c. 240 are amended in the 2010 bill. A subsequent owner may now bring an action to clear title after one year from the due date of the mortgage in the same manner as the Mortgage Discharge Act provided for a mortgagor.

An active member of REBA, Beth Barton serves on the association's Title Standards Committee and Commercial Real Estate Finance Committee. She is title counsel at CATIC, New England's Bar-Related title insurance underwriter, and vice chair of the MBA's Property Law Section Council. She can be contacted at BBarton@CATICACCESS.COM.

New environmental laws and regulations affect your real estate practice

Continued from page 14

which would trigger more scrutiny and justification for Article 97 transfers and use changes, was reported favorably from the Joint Committee on Environment, Natural Resources and Agriculture and referred to the House Committee on Ways and Means. PLPA would require that in order to change the use of Article 97 land it must be shown that there is no feasible alternative and whether replacement land of equivalent acreage, market value and natural resource value is to be supplied in its place.

Finally, on the zoning and subdivision front, in surprising progress after going nowhere for several years, a Comprehensive Land Use Reform and Partnerships Act was reported favorably from the Municipalities and Regional Government Committee. CLURPA would address the pitfalls of land use planning in Massachusetts by, among other things, amending sections of the subdivision control law and the zoning act, creating Chapter 40U, which gives incentives to communities opting to plan according to the commonwealth's Sustainable Development Principles and rewrites our master planning statutes.

To quote an ancient Chinese curse, "May you live in interesting times!"

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