Transcendental lawyering – legal ethics and social networking
PAGE 6

Now more than ever – foreclosure due diligence
PAGE 11

U.S. POSTAGE
PAID
BOSTON, MA
PERMIT#: 1323

WWW.REBA.NET
REBA news
THE NEWSPAPER OF THE REAL ESTATE BAR ASSOCIATION
JANUARY, 2011
Vol. 8, No. 1
A publication of The Warren Group

THE 2010 HOMESTEAD ACT

# A NEW DAY DAWNS for Mass. Homeowners

BY MICHAEL J. GOLDBERG

For as many years as most real estate and bankruptcy practitioners can remember, the Massachusetts homestead statute, G.L. c. 188, §1, has been the source of unending difficulty.

Called on to give advice regarding its protections, lawyers have been compelled to interpret its often-archaic and unclear language, and make predictions regarding its application that would often prove incorrect. And the trouble was hardly limited to practicing lawyers – even the judges of the Bankruptcy Court in Massachusetts were frequently vexed by its inscrutable language.

As one of those judges recently commented, "a 'plain meaning' analysis of the Massachusetts Homestead Statute is no walk

See NEW DAY, page 4

FROM THE PRESIDENT'S DESK

# 'Interesting times' for REBA in 2011

BY EDWARD BLOOM

"May you live in interesting times" is often cited as an ancient Chinese proverb or curse. Sources, however, indicate that scholars know of no such phrase of Chinese origin, and believe that it is a Western invention that ascribed the phrase to the Chinese, to make it more enduring, ancient and mysterious.

Be that as it may, there is no doubt that REBA and its members are living "in interesting times." With the economic meltdown of our financial institutions and its profound effect on the real estate market, the pandemic of mortgage foreclosures, and the slipshod practice of many lenders in using non-lawyers and ignoring the time-honored legal requirements regarding title transfers and foreclosure procedures, REBA members have been severely tested, both economically and professionally.

Edward Bloom

It is a tradition, as a new year dawns, to examine the year that is ending and to contemplate what lies ahead. For REBA, 2010 began with the Association facing an adverse decision from the U.S. District Court in the National Real Estate Information Services (NREIS) litigation, which included a judgment against REBA for NREIS's legal fees of almost $1 million.

See BLOOM, page 2

# Legislative year in review: REBA comes out ahead

BY EDWARD J. SMITH

The 186th biennial session of the Massachusetts General Court, which expired Jan. 5, 2011, began with the election of a new House Speaker, Rep. Robert A. DeLeo. Deleo and his colleagues Senate President Therese Murray and Gov. Deval Patrick have not been very different from one another in their governing philosophies during the term. No doubt a major reason for that has been the economic downturn and the resulting steep decline in tax collections that might have been available in other times for spending on new programs. Differing visions have been tempered by the realities of the recession. All three leaders seem to have embraced a firm list of priorities in the coming session: taming the budget deficit; redistricting for federal and state legislative districts; probation hiring reform; hospital payments reform; and maintaining the state's advances in primary and secondary education.

But for one or two notable policy differences, the three leaders have enjoyed a productive working relationship.

See LEGISLATION, page 7

Despite daunting conditions on Beacon Hill, REBA succeeded in threading the needle to enact three major bills benefiting real estate and transactional lawyer in the 2009-2010 session.

# BLOOM: Judicial foreclosures issue looms

CONTINUED FROM PAGE 1

The judgment, a result of REBA's determination to pursue the unauthorized practice of law by non-lawyer service providers, such as NREIS, had suddenly imperiled REBA's very existence. Throughout the precarious months that followed, REBA's president, Tom Moriarty, rallied members, who were shocked and discouraged by the unexpected twist in the NREIS litigation, exhorting them to continue to support REBA because the fight was not over yet.

He worked tirelessly to successfully urge both the Boston Bar Association (BBA) and the Massachusetts Bar Association (MBA) to file *amicus* briefs supporting REBA's appeal to the First Circuit Court of Appeals; and when the First Circuit overturned the District Court's decision and vacated the judgment against REBA, Tom once again took to the road to organize almost every bar association in Massachusetts, as well as the attorney general's office and a number of the registrars of various counties, to file *amicus* briefs supporting REBA's position before the Supreme Judicial Court, to whom the First Circuit had certified certain questions in the case regarding what constitutes the practice of law in Massachusetts. The SJC heard oral arguments in November and its decision is expected in the first half of 2011.

In 2010, REBA enjoyed the fruits of its six-year legislative effort when Gov. Deval Patrick signed into law a comprehensive revision of the Massachusetts homestead law. This legislation (see cover story) had been proposed and advocated by REBA, working with the BBA, MBA and the Massachusetts Bankers Association, and is the product of the drafting of Mike Goldberg, co-chair of REBA Legislation Committee, assisted by Lisa Delaney and Erica Bigelow. Special thanks also need to be given to Ed Smith, REBA's legislative counsel, who carefully shepherded the bill through the Massachusetts Legislature.

REBA was also successful on its legislative front with the enactment of Chapter 282 of the Acts of 2010 (which clarified and updated the 2006 Mortgage Discharge Act that REBA sponsored to completely overhaul Massachusetts mortgage discharge law and practice), and the enactment of Chapter 298 of the Acts of 2010 (which overruled the Appeals Court's 2005 *National Lumber* decision and clarified that no instrument mailed to a Registry of Deeds will be considered recorded until it is actually stamped with an instrument number or book and page number).

2010 also saw the SJC render decisions in *Moot v. DEP*, *Norfolk & Dedham Mutual Fire Ins. Co. v. Morrison*, and *Faneuil Investors Group v. Board of Selectmen of Dennis*, that reflected positions advocated in *amicus* briefs filed by REBA. These cases, which have been discussed in prior editions of this newspaper, clarify the common law in important practice areas of concern to REBA's members.

Looking ahead to 2011, REBA awaits the SJC's decision in the *NREIS* case, whose outcome may have a significant effect on the conveyancing practice of its many members. Another critical case is the recently decided *Ibanez* case, a matter in which the SJC affirmed the Land Court's holding that a lender who has taken an assignment of a mortgage cannot begin the foreclosure process unless it holds a valid assignment in its possession at the time it first publishes notice of its foreclosure sale. REBA had filed an *amicus* brief with the SJC advising the court to uphold the Land Court's decision, but to apply the holding only prospectively, thus bringing order to the sloppy practice of lending institutions while avoiding the chaotic impact on real estate titles of the Land Court's ruling. The SJC, however, declined to apply its decision only prospectively and its decision thus does not resolve the unexpected and far-reaching implications affecting thousands of real estate titles in Massachusetts resulting from the Land Court's earlier decision. The SJC's ruling will certainly affect the Massachusetts real estate market and REBA's members in 2011.

Also looming in 2011 is the issue of whether Massachusetts, to protect the due process rights of homeowners, should require all future mortgage foreclosures to be judicial foreclosures, thus abolishing the current Massachusetts practice of non-judicial power of sale foreclosures. Given the budget cuts that have been visited on the judicial system and the tidal wave of cases that would overwhelm the understaffed courts if judicial foreclosure were to be mandated, this issue is a complex one without a simple fix. The matter will be hotly debated in 2011 and REBA will no doubt be involved in the discussion. So while some would consider it a curse to "live in interesting times," I consider it a challenge, and I look forward to these interesting times coming in 2011 for REBA and its members.

A partner at Sherin and Lodgen LLP, Ed Bloom has chaired the REBA leasing and amicus committees, and is currently president of REBA. He was recently named as a member of the American College of Real Estate Lawyers. He can be reached at embloom@sherin.com.

## Paralegal and Title Examiner Committee seeks new members

The Paralegal Title Examiner Committee (PTEC) serves REBA's non-lawyer members with meetings, programs, mentoring and networking.

PTEC's 2011 co-chairs are Mark Constable and Don Brown. Constable is an independent freelance title examiner covering counties across the state. He is also a member of the Massachusetts and New York bars. Co-chair Don Brown is a senior paralegal in the claims department of First American Title Insurance Company's Boston office.

Constable and Brown are planning a series of meetings and programs, including an hour-long break-out session at REBA's all-day Spring Conference on May 9, 2011, in Westborough.

To learn more about PTEC contact Constable at mark@cfpclaw.com or Brown at donaldbrown@firstam.com.

## Title Standards Committee update

The Title Standards Committee is REBA's oldest committee, dating back to at least 1971, making this coming year the committee's 40th birthday. The *REBA Handbook of Standards and Forms*, available on CD, is considered the crown jewel of association member benefits, a *sine qua non* for real estate lawyers

Richard Serkey

The preamble to REBA's Title Standards provides in part that they "express the practice considered reasonable by [its] members;" that "this standard of reasonableness is intended to assist the conveyancer in determining if title is marketable;" and that the objectives are to "protect sellers by preventing sales from being lost by technical and non-substantive objections to title," while at the same time "protect[ing] buyers by avoiding disputes and assuring them a title that will be marketable in the event of a resale."

To accomplish these salutary goals, the committee's task is to avoid making practitioners the prisoners of purists while not, at the same time, condoning sloppy practice. This is always a delicate balance. The committee incorporates changes in statutory and case law into existing and proposed title standards, ethical standards and forms. At its monthly meetings, the committee regularly wordsmiths this inventory of standards and forms. Among the committee's agenda items for 2011 are incorporating the changes recently approved to the Mortgage Discharge Law, as well as the changes wrought by the new Massachusetts Uniform Probate Code, into existing forms and standards.

This year, longtime REBA member Richard Serkey will join Chris Pitt as the group's co-chairman. The committee welcomes new members; any practitioners interested in becoming committee members should forward a *curriculum vitae* to Andrea Hardy at hardy@reba.net.



REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

50 Congress Street, Suite 600
Boston, Massachusetts 02109-4075
www.reba.net

President: **Edward M. Bloom** embloom@sherin.com
President Elect: **Christopher S. Pitt** cpitt@rc.com
Immediate Past President: **Thomas O. Moriarty** tmoriarty@meeb.com
Clerk: **Michelle T. Simons** msimons@legalpro.com
Treasurer: **Michael D. MacClary** mmaclary@burnslev.com
Executive Director, Editor: **Peter Wittenborg** wittenborg@reba.net
Legislation Counsel: **Edward J. Smith** ejs@ejsmithrelaw.com
Managing Editor: **Nicole Cunningham** cunningham@reba.net
Assistant Editor: **Andrea Hardy** hardy@reba.net

**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 inquires relative to the Association's Title Standards, Practice Standards, Ethical Standards and Forms with the understanding that advice to Associations members is not, of course, a legal option.



Standard bulk postage paid at Boston MA, 02205.

THE WARREN GROUP
Real Estate & Financial Information Since 1872

280 Summer Street, 8th Floor
Boston, MA 02210-1131
(800) 356-8805
www.thewarrengroup.com

**TIMOTHY M. WARREN,** Chairman
**TIMOTHY M. WARREN JR.,** CEO and Publisher
**DAVID B. LOVINS,** President and COO
**VINCENT MICHAEL VALVO,** Group Publisher & Editor-in-Chief

**CUSTOM PUBLICATIONS**
Editor: **Christina P. O'Neill**
Associate Editor: **Cassidy Norton Murphy**

**CREATIVE SERVICES**
Creative Director: **John Bottini**
Senior Graphic Designer: **Scott Ellison**
Graphic Designer: **Nate Silva**

**PUBLISHING GROUP SALES & MARKETING**
Publications Group Sales Manager: **George Chateauneuf**

**NEWSPAPERS**
Advertising Account Manager: **Mark J. Schultz**
Advertising, Marketing & Events Coordinator: **Emily Torres**

**EVENTS**
Director of Events: Sarah Cunningham

COMMENTARY

# No good deed goes unpunished

BY PAUL F. ALPHEN

"I felt like Dorfman being lectured by Blutarsky!" My friend Joe exclaimed as he regaled me with another tale regarding a zoning board meeting he had attended the previous night. "You know, the scene when Blutarsky tells Dorfman: 'You [screwed] up; you trusted us!'" Of course I appreciated the *Animal House* reference.

Joe has practiced before local land use boards for decades. In one bucolic community the planning board had, for as long as Joe could remember, required Dover Amendment uses to obtain site plan approval before getting a building permit. The requirement was so institutionalized that a few years ago a day care provider had to go to court three times before it was able to obtain a building permit. However, last month the building department issued a building permit for an addition to a child care facility without the benefit of site plan review. Joe was retained by the neighborhood, and appealed the decision of the building commissioner to the Zoning Board of Appeals. Appearing before the ZBA, Joe recounted evidence of the practice of the town to require site plan approval and sought equal application of the requirement. He was shocked to hear a ZBA member, who happens to be a lawyer, lecture Joe that Joe should have challenged in court every prior attempt by the planning board to require site plan approval for Dover Amendment uses. In other words, the local attorneys that had cooperated with the town over the years by submitting site plan review applications for churches, farm stands and day care facilities, were fools. Lesson learned. No good deed goes unpunished.


Paul F. Alphen

I checked with other friends to see if they also felt that no good deed goes unpunished. The flood gates opened. "Thanks for asking!" said William. "A few years ago I found myself on the witness stand being cross examined by town counsel after a client filed a complaint that the planning board had violated the open meeting law. Town counsel criticized me for not bursting into the illegal executive session and accusing the board of violating the law! He asserted that it was my fault for not physically stopping the illegal meeting."

Ed sent me a copy of the court decision within which his client attempted to obtain site plan approval via constructive approval after a planning board failed to render a decision within the time limits contained in the local by-law. After numerous appearances before the board, Ed had articulated that his client had submitted all of the materials required by the board and he now expected the board to take action. After a discussion, the chairman announced that the board would continue the hearing for three weeks. Ed was not asked if his client would assent to an extension, and the planning board went on to the next agenda item. Thereafter, Ed's client sought a certificate of constructive approval and ultimately had to go to court to attempt to obtain same. In the trial, town counsel convinced the court that Ed's silence was tantamount to an agreement to extend the time for the board to make a decision (notwithstanding that the parallel subdivision and special permit statutes require a written agreement between the board and the applicant, filed with the town clerk, in order to effectuate an extension). Ed now makes a scene whenever a board fails to render a decision within the required time.

Sandy told me that she had filed a complaint in court for breach of lease on behalf of a landlord. She got a few calls from the tenant's attorney requesting extensions to the time for the defendant to file an answer because he had not yet had time to meet with his client. Sandy had dealt with the attorney on other matters from time to time and extended the courtesy. You know what happened next. Ultimately Sandy obtained a default judgment and the day before the assessment of damages hearing, the tenant filed for bankruptcy protection.

My friend Steve told me a story about channel surfing one night and stopping on a broadcast of the selectmen's meeting when he heard his name used in vain. He had been appointed to a search committee for the town administrator a month earlier. A certain political faction in the town was trying to obtain more influence over the selection process, and a member of the faction appeared at the "open forum" portion of a selectmen's meeting and asserted that Steve was violating the conflict of interest statutes by serving on the committee. Although the accusations were ridiculous, broadcast on cable television was a 20-minute discussion about the possibility that Steve was violating the law… without any opportunity for Steve to defend himself and defend his reputation. At the request of his wife, Steve resigned from the committee and no longer volunteers for municipal service.

Unfortunately, most of the stories I heard cannot be printed here. They involved attorneys who had served on volunteer municipal boards. I heard too many stories of attorneys who were needlessly accused of conflicts of interest by persons or groups with an axe to grind, including stories of having to appear before the State Ethics Commission, and worse. Those attorneys will never again volunteer for municipal service.

REBA's president in 2008, Paul Alphen currently chairs the association's long-term planning committee. A frequent and welcome commentator in these pages, he is a partner in Balas, Alphen and Santos, P.C. where he concentrates in commercial and residential real estate development and land use regulation. Alphen can be reached at paul@lawbas.com.

# REBA files *amicus* on *Ibanez* SJC appeal

BY ROBERT J. MORIARTY

The Real Estate Bar Association (REBA) recently submitted an *Amicus Curiae* brief with the Supreme Judicial Court in the consolidated cases of *U.S. Bank National Association, as trustee v. Ibanez* and *LaSalle Bank, National Association, as trustee v. Rosario*, the two Land Court decisions that have brought to light the issues with timing of assignments of mortgages and foreclosure actions that have become known as "Ibanez" issues.


Robert J. Moriarty

REBA frequently submits *amicus* briefs on issues of concern to its nearly 3,000 members, who constitute a significant portion of the state's real estate practitioners.

REBA's brief posits that while REBA understands the legitimate desire to make the secondary mortgage market lenders financially responsible for their past practices, upholding the decisions might result in an unintended harm to an entire class of persons who have relied in good faith on a perception of the status of the law, that predates the secondary mortgage market's recent excesses. REBA raised the concern that a group of property owners will no longer have title to their homes if these decisions are upheld, and that many will have no adequate remedy. Even if money damages were available, money damages cannot adequately recompense those facing potential displacement from their home. REBA states that the decisions in *Ibanez* and *Rosario* should be upheld, but that the rulings should be made prospective, and asked the court to prospectively rule that all assignments must be duly executed and recorded at the time of the first publication of a mortgagee's notice of sale.

During oral argument on the consolidated cases in early October, it became apparent that the record in the Land Court below was incomplete. Banks were unable to produce much of the securitization documentation that they relied upon for the specific matters before the Court. With that recognition, oral argument turned to the more global issues involved with *Ibanez*-type assignments. While oral argument does not predict the outcome of a case, the justices were clearly concerned with the decision's potential impact on the significant number of foreclosures that have been conducted in reliance on the practice of obtaining confirmatory assignments with an earlier "effective date" to correct issues with the chain of assignments. Justice Francis Spina specifically asked counsel for the appellees what they would have the court do with all those who had purchased properties in reliance on the state of the law as perceived by the real estate bar. Chief Justice Margaret Marshall specifically asked how the common law could be changed to require recording of all assignments at the time that a foreclosure is started on a prospective basis.

REBA's brief raised the specter of potentially no remedy for thousands of persons who own homes that have chains of title that rely on a foreclosure in which there is an *Ibanez* issue. The brief cited the recently decided case of *Bevilacqua v. Rodriguez*, decided by Judge Keith Long. U.S. Bank had foreclosed on the property without having previously obtained an assignment from MERS, and then sold the property. To make the title marketable, a "try title" action pursuant to G.L. c. 240, §1-5 was brought in the Land Court. Long determined that the foreclosure was invalid, making the deed to the new owner a nullity as U.S. Bank had no title to give, and that the owner was therefore not entitled to bring a try title action. Long dismissed the action. What was apparently not in the record was that the owner had submitted the property to G.L. c. 183A as a condominium, and sold all four units. Now, there are four owners and four mortgagees who have no title, and no remedy (and presumably four attorneys who have certified titles).

Long has suggested that the *Bevilacqua* owner and others similarly situated may have a cause of action against the lender that improperly foreclosed the property and conveyed title to them. REBA's brief suggested that this remedy could well be illusory. First, these affected persons must be able to find attorneys willing to take on the cases on their behalf, they must pay the litigation expenses, and to wait for what might become several years to obtain a judgment against the lender. Many secondary mortgage market lenders have filed for protection in the bankruptcy courts or simply no longer exist. If an award of money damages is the only remedy available to this class of persons, it may be no remedy at all for many if not most. In the meantime, they could presumably be evicted by the "true owner."

The decision in *Bevilacqua* suggests that the foreclosures were nullities, and the inference is therefore that the mortgages could again be foreclosed. Assuming lenders could be found to conduct re-foreclosures, and that they were willing to do so, possibly subjecting themselves to additional liability, there can be no assurance that the original owners will be able to reacquire their homes. They may not be the successful bidders at new auction sales, or they may no longer qualify for financing to reacquire their homes. One can only imagine the nightmares if a third party were to become the high bidder.

REBA also noted that this is not a recent phenomenon. The secondary mortgage market and confirmatory assignments have existed since the late 1980s and early 1990s. A remedy for buyers of homes with titles based on a foreclosure conducted as much as 15 or more years ago will be even more remote and illusory.

*Author's note:* The recent Supreme Judicial Court decision regarding *Ibanez* is not the last that we will hear of this issue. It was determined that it is not necessary to have a recordable assignment in hand at either the first publication or at auction, so long as the lender actually held title to the loan. It is possible to rectify the assignment problem with a confirmatory instrument, according to the decision. Conveyancers and the courts will need to determine how this can be accomplished.

Bob Moriarty co-chairs the association's practice of law by non-lawyers committee. Together with Ward Graham, he drafted REBA's *amicus curiae* brief in the *Ibanez* appeal. He can be contacted by e-mail at rmoriarty@mmoglaw.com.

# NEW DAY: 2010 act includes 'automatic' homestead

CONTINUED FROM PAGE 1

in the park." The wording is often awkward and hyper-technical; indeed, the statue has repeatedly been criticized for its lack of clarity.

On Dec. 16, 2010, Gov. Deval Patrick signed a complete overhaul of the homestead statute, codified as Chapter 395 of the Acts of 2010 (the "2010 Homestead Act" or the Act). Based largely on legislation drafted by a subcommittee of REBA's Legislation Committee, the 2010 Homestead Act – which becomes effective on March 16, 2011 – promises to clear up many of the problems that had arisen in the application of the former statute.

Among its most important provisions, the 2010 Homestead Act provides a safety net in the form of an automatic homestead of $125,000, available to all homeowners in the Commonwealth regardless of whether they file a declaration of homestead. The Act still permits maximum protection of $500,000 (the current amount available) upon the filing of a declaration of homestead.

Playing a major role in the passage of the legislation were its chief sponsors, Sen. Cynthia Stone Creem and Rep. Eugene L. O'Flaherty, as well as the chairs of the Senate and House Committees on Ways and Means, Sen. Steven C. Panagiotakos and Rep. Charles A. Murphy. Each was instrumental in procuring enactment of this sweeping new law.

## THE BACKGROUND – PROBLEMS UNDER THE FORMER LAW

The soon-to-be-superseded homestead law was enacted in 1851, at a time when, among other things, women could not own real property. Except as amended from time to time to recognize that elderly people have greater financial burdens, and by amendments that have increased the amount of protection to reflect increasing home values, the statute had remained substantively unchanged since its adoption. However, the statute, when applied to a modern family and modern ownership structures, led to numerous problems. Moreover, its unclear language and outdated provisions often led to surprising, if not counterintuitive, results. For example:

- Many, if not most, refinancing mortgages provide for a waiver of the borrower's homestead rights. That waiver left the homeowner potentially unprotected against the claims of his or her other creditors – and, even if the borrower refiled after signing the mortgage, his or her new homestead would not have provided protection against debts incurred prior to filing the new homestead declaration.

Sen. Cynthia Stone Creem, co-chair of the legislature's Joint Committee on the Judiciary, joined a recent meeting of REBA's Legislation Committee for a discussion of the association's legislation to overhaul the Massachusetts homestead statute. She is shown here with Mike Goldberg, co-chair of the REBA Legislation Committee and principal draftsman of the homestead reform legislation. The new law, Chapter 395 of the Acts of 2010, will take effect on March 16, 2011. An hour-long program on the new homestead law will be part of REBA's Annual Meeting and Conference on Monday, May 9, 2011 in Westborough.

- Under the existing homestead law, if the homestead were to be partially or totally destroyed by a casualty, the insurance proceeds would not be protected under the homestead statute – even if the declarant intended to use them to reconstruct the home. See *In re Wiesner* (2007).
- Under the statute, there was substantial uncertainty whether trust beneficiaries residing in the home were entitled to file a homestead declaration – and it was commonly believed such protection would not be available. Compare *In re Zmijewski* (2008), where the beneficial interest was found to be in trust personalty, not realty, and therefore not entitled to homestead exemption, with *In re Rodrigues* (2010), where the settlor and trustee of the trust were entitled to homestead protection based on her intent to reside in the home.
- Where two spouses owned a home as tenants by the entirety, but only one of them files a homestead declaration protecting both spouses, after a divorce, which transforms their ownership into a tenancy in common, the non-filing spouse loses his/her homestead protection; see *In re Cassese* (2002).

Among its most important changes is the creation of the "automatic" homestead, which provides all homeowners with $125,000 in protection of their equity in their homes without the need for a filing.

- Under the law, if a declarant owned a home with his or her spouse as tenant by the entirety, and then transferred the house to one spouse without reserving the homestead declaration in the deed, homestead protection could be lost.
- The statute's handling of manufactured homes was so unclear (not surprising, since they didn't exist in the 19th century!) that two different bankruptcy judges came to opposite conclusions regarding the applicability of the homestead to manufactured homes.

NEXT PAGE ▶

CONTINUED FROM PAGE 4

- And the existing law's provision for only one signature on a homestead declaration – even if the home is owned jointly by a married couple – was an endless source of confusion and misunderstanding. No one knew how to answer the question "which of us should sign?"

## THE 2010 HOMESTEAD ACT

The 2010 Homestead Act will effect sweeping changes in the rules governing the homestead exemption in Massachusetts, removing many of the inconsistencies and ambiguities described above. Among its most important changes is the creation of the "automatic" homestead, which provides all homeowners with $125,000 in protection of their equity in their homes without the need for a filing.

Given the prior law's requirement of the filing of a declaration, and the number of homeowners not represented by counsel at the closing of their home purchase, many homeowners simply failed to avail themselves of the protection of the exemption. This resulted in a situation where those who could afford a lawyer at closing – often, those with greater financial resources – could rely on their home equity in the event of financial hardship, but the less fortunate could not. This arbitrary result obviously created great hardship, particularly among consumers without significant financial resources other than their equity in their homes.

The new provision eliminates this harsh result, providing a safety net for Massachusetts homeowners. Assuming a down payment of 20 percent of a home's original price, this means that homes of a value of up to $625,000 are fully protected, under the 2010 Homestead Act, against the claims of creditors. At a time of great economic hardship, this change will produce obvious benefits for Massachusetts homeowners – without exposing creditors of those families to unfair burdens (as they would if, for example, the automatic homestead were set at $500,000). And the new law still permits homeowners to avail themselves of the full $500,000 exemption by filing a declaration of homestead.

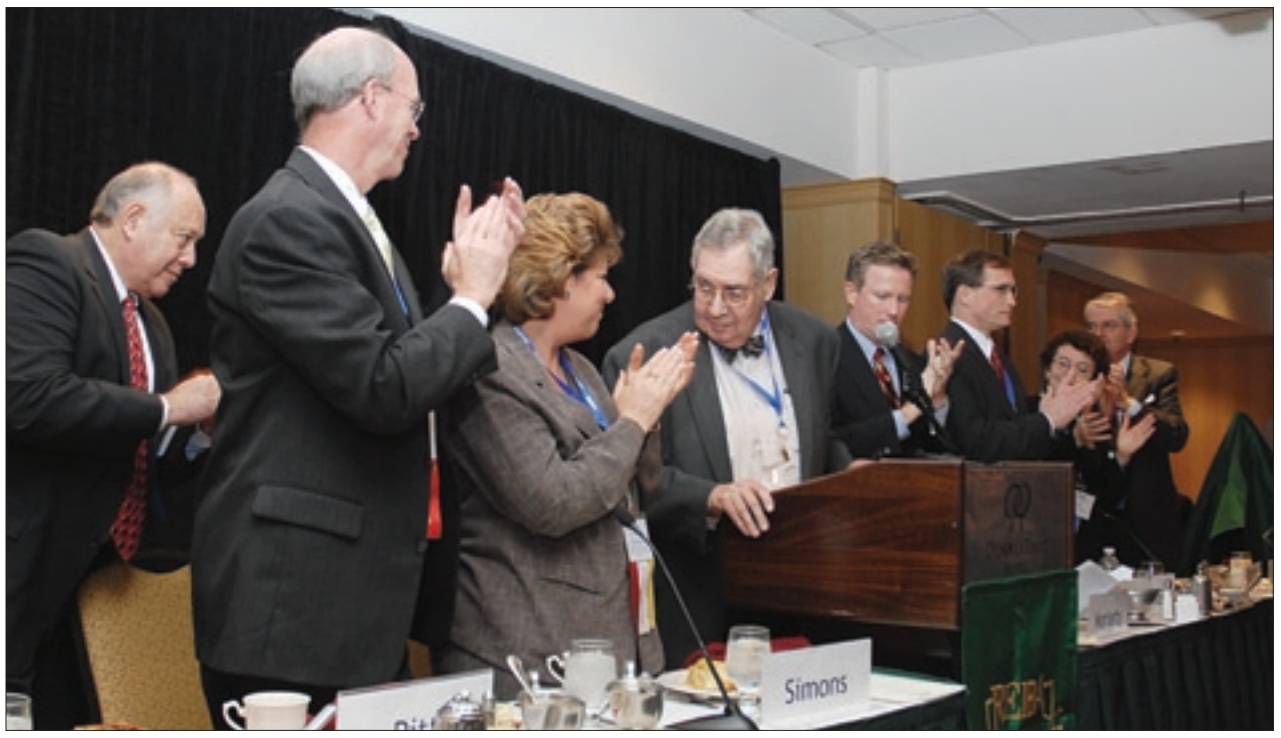
The 2010 Homestead Act will result in numerous additional changes to current law, which will render its impact more logical, equitable and consistent with the modern family unit. Among the more important changes that are embodied in the new law:

- Mortgages will no longer terminate previously existing homesteads – the Act provides that, even where a refinancing mortgage contains language purporting to waive or terminate the homestead, its impact will be limited to a subordination.
- The form of homestead declaration will be much more logical – for example, it will require the signature of both spouses when they hold title as tenants by the entirety.
- Proceeds from the sale of a home, or insurance proceeds, will be entitled to homestead protection (for up to a year for sale proceeds, and two years for insurance proceeds).
- Beneficiaries of trusts will be entitled to homestead protection – in the case of declared homesteads, declarations must be executed by the trustee.
- Transfers among family members will not terminate a previously declared homestead – even if the homestead isn't reserved in the deed.
- The exclusion in the homestead statute for pre-existing debts has been eliminated – leaving only an exclusion for pre-existing liens. This change eliminates a discrepancy that existed between the treatment of homesteads in bankruptcy – where the pre-existing debt exclusion was ruled unenforceable by the First Circuit in *Patriot Portfolio, LLC v. Weinstein* (1999) – and in state-law proceedings. So too has the provision in the former law that terminated a homestead upon the filing of a later declaration; under the 2010 Homestead Act, the later filing relates back to the earlier one.
- Manufactured homes are eligible for protection under all provisions of the statute – thus bringing the protections of the statute to a group of homeowners sorely in need of such relief.

Thus, March 16, 2011, marks a new day for homeowners of the Commonwealth. With the 2010 Homestead Act, those homeowners will have the benefit of a safety net, available without filing a homestead declaration, and a modern, logical and equitable homestead statute. Although the interpretation of the new law awaits judicial action, one thing is certain: in a period of great financial uncertainty, the new law will provide welcome relief to many residents of the Commonwealth.

Mike Goldberg is a partner in the Boston firm of Casner & Edwards, LLP, concentrating in bankruptcy, insolvency and creditors' rights. He is the principal draftsman of REBA's overhaul of the homestead law. He can be contacted by e-mail at goldberg@casneredwards.com.


REBA board member Mary Eaton meets the Aflac duck. Aflac was one of the meeting's sponsors.



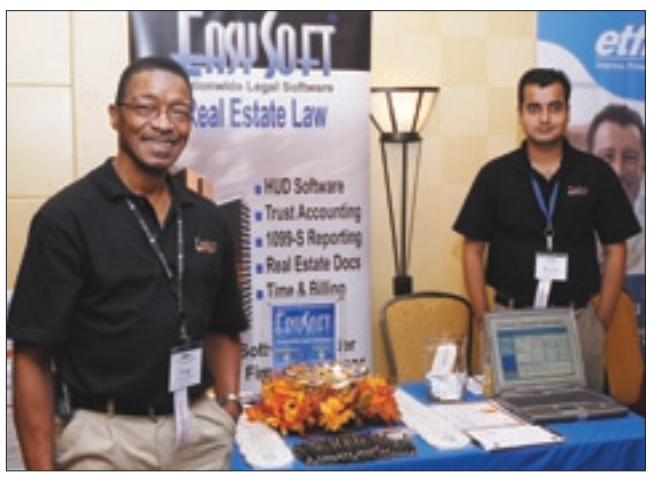

**LEFT:** Officers and head table guests acknowledge award recipient Haskell Shapiro.

**BELOW:** Arline Shapiro acknowledges applause for her husband.

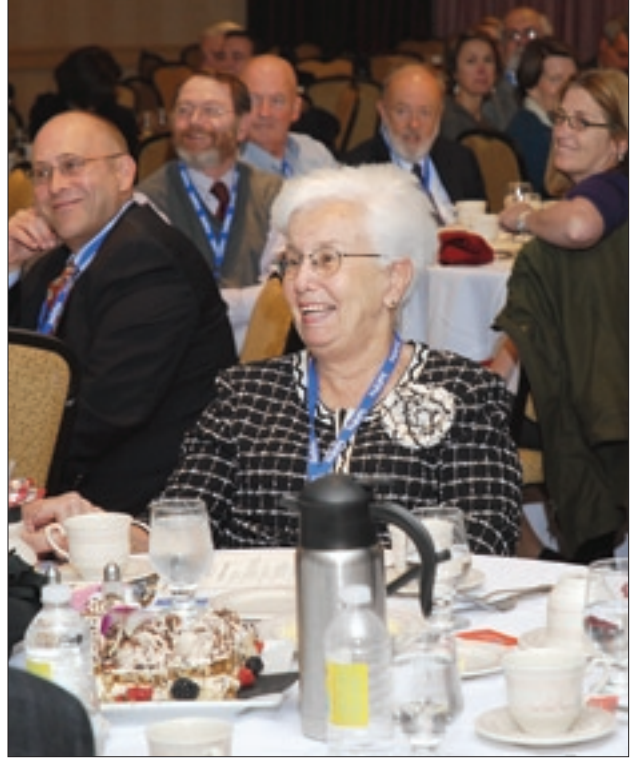
# REBA Annual Meeting

REBA honors Haskell Shapiro, a legend in Massachusetts title practice for nearly 40 years, who retired in 2010


President-elect Ed Bloom gavels the meeting to order after receiving the gavel from outgoing president Tom Moriarty.




**LEFT:** EasySoft, one of more than 36 exhibitors at the annual meeting.



TRANSCENDENTAL LAWYERING

# To boldly go where no lawyer has gone before:

## Legal ethics and social networking

BY JAMES S. BOLAN

Google, YouTube, Facebook, LinkedIn, Plaxo, Second Life, e-mail, social networks, chat rooms, forums, bulletin boards, listservs, newsgroups and virtual reality sites: these are the forms of 21st century communications among peers, third parties, clients and potential clients. Lawyers are using the web in exponential measure, but such communication does not change a lawyer's duties and responsibilities under real world ethics rules. Henry David Thoreau, meet Dick Tracy. Dick Tracy, meet Philip Rosedale.

James S. Bolan

Under the Massachusetts Rules of Professional Conduct, lawyers must abide by ethics rules where they are licensed, where they have offices, and where they direct communications, regardless of where the conduct occurs. A lawyer not admitted in Massachusetts is nonetheless subject to the disciplinary authority of this and the lawyer's home jurisdiction if the lawyer provides any legal services here. Providing legal services in a jurisdiction where one is not admitted can result in unauthorized practice of law (UPL) issues.

How does one know where the person online is located, or even how old they are? There is a possibility that one could engage in unauthorized practice of law when communicating in the ether. Protection against UPL should include disclaimers in online communications as to one's licensure and geographic limitation on practice. Do not take on a relationship in a jurisdiction where one is not admitted.

### ACCIDENTAL RELATIONSHIP

One could, by communicating in cyberspace, unintentionally create an attorney-client relationship. In 2007, the MBA Ethics Committee issued an opinion (2007-01) that, in the absence of an effective disclaimer, a lawyer who receives unsolicited information from a prospective client through an e-mail link on a law firm website must hold the information in confidence even if the lawyer declines the representation.

Communication in cyberspace is subject to bar regulation in many states. ABA Model Rule 7.2 was amended to include internet advertising. The Massachusetts Rule of Professional Conduct 7.2(a) includes public media or written non-solicitation communication. Advertising rules may apply even if the site is a non-confidential chat room, thus rendering a lawyer not only subject to disciplinary rules, but risking confidentiality. While websites and web pages constitute advertising, is the same true for virtual world or MySpace pages? Are these activities more akin to solicitation than advertising?

While websites constitute advertising, no rules expressly state that online offices in "virtual" communities do. In virtual cyberspace, the level of interaction surpasses chat rooms. Some state ethics committees (California and Arizona) have conditionally blessed communication with prospective clients through real-time electronic contact. Others (Michigan, West Virginia, Virginia and Utah) have opined that in-person solicitation rules apply to interactive communications. At least one state (Florida) has decided that a lawyer may not solicit prospective clients through real-time communications. Rule 7.3 of the Massachusetts Rules of

Professional Conduct precludes personal communication by electronic device "or otherwise."

If your network page contains comments from clients or colleagues about how fabulous you are (hold the applause!), you may run afoul of testimonial prohibitions in some states. Massachusetts does not expressly prohibit testimonials, but California, New York and others do. And, the Constitution notwithstanding, many states (Kentucky, New Jersey, Florida and Nevada, for example, but not Massachusetts) still have rules requiring filing and pre-screening of ads. Some states (New York) still require labeling of "attorney advertising," which is applicable to internet activity. Finally, mandatory disclaimers are required in some states. Here are some examples: "he choice of a lawyer is an important decision that should not be based solely upon advertisements" and "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers." A number of states are now insisting that social websites or video sharing sites must comply with advertising rules. (See new Texas rules August 2008.) No matter what, one must ensure that what you say in cyberspace is true and not misleading. (See Mass. R. Prof. C., Rule 7.1.)

### BE CAREFUL ABOUT YOUR NETWORK'S ACCESS

The rule always was, if you don't mind seeing what you write or say on the front page of the *Herald*, then fire away!

Twitter is no different from the conversation in the courthouse elevator. Attorneys need to make sure that when they

See BOLAN, page 9

# LEGISLATION: Despite hurdles, accomplishments notable

CONTINUED FROM PAGE 1

Even with leaving major issues to the end of the session, notable late-inning achievements topped off a pretty good record of accomplishment. Political as well as budgetary pressures drove debate that resulted in notable reforms in ethics and lobbying laws, pension entitlements, transportation bureaucracy, economic development, criminal records management, health insurance premium relief for small businesses and other matters.

For other legislation, the single most operative question continues to be: Will it cost money? REBA has succeeded in threading the needle with a number of measures important to real estate lawyers and their clients. Chief among them was the omnibus Homestead Law Reform in Chapter 395 of the Acts of 2010. (An explanation of the Act appears on page 1.) Another success was Chapter 282 of the Acts of 2010, technical changes to the mortgage discharge statute (Ch. 63 of 2006), to confirm, for assignment and discharge purposes, the identity of an off-record successor mortgagee when the record mortgagee is defunct, but the successor entity can be identified by reference to other documents of record (outside the chain of title) or to governmental or quasigovernmental databases; and to clarify provisions intended to authorize a variety of individuals having apparent authority to execute documents on behalf of a mortgage holder, among other helpful changes.

Chapter 298 of the Acts of 2010 provides that no instrument shall be considered to have been recorded, until the register approves the instrument for recording and assigns to the instrument an instrument number, and/or book and page number as the case may be. This would reverse a case holding, in *National Lumber Co. v. Lombardi* (2005), which held that an instrument is considered to be timely filed upon proof of receipt by the register. The product of a joint effort with the Massachusetts Registers of Deeds and Assistant Registers of Deeds Association, the statute also requires that any change or correction to a particular record shall be documented in such a manner that the fact that there has been a correction, and the nature and date of the correction, shall become part of the record at the registry office. This will document the correction in the record in the event that an examiner's work product becomes the subject of an errors and omissions claim based on a search conducted before the correction of the applicable record. Also, the Act acknowledges that electronic record-keeping is an acceptable alternative to bound record books under the statute.

Early in the session, REBA partnered with the Community Associations Institute in the passage of sections 20, 25 and 46 of Chapter 166 of the Acts of 2009. Changes to the Massachusetts tax code in 2008 inadvertently reclassified condominium associations as corporations for tax purposes.

The effect of this – beginning with tax year 2009 – was to expose association reserves to a net worth tax and increase the tax rate on their other income. Attorneys and CPAs were able to convince the Department of Revenue and the legislature to restore condominiums to their pre-2009 tax status. Many REBA members represent condominium associations in their affairs. In our view it does not make sense to treat condominium associations as business trusts. They are not in business to turn a profit, but simply to provide services to their member unit owners.

Again partnering with the Community Associations Institute, REBA successfully opposed legislation that would have permitted cities and towns in most cases to avoid the obligation to pay common area expense fees on condominium units in tax title. Legislation would have reversed the holding in the case of *Town of Milford v. Boyd* (2001), in which the Supreme Judicial Court required a municipality to pay common area expenses for a condominium unit, once it has recorded a taking of the property for unpaid real estate taxes. A city or town necessarily benefits from the covenant to pay common area expense fees because the money is used to pay for insurance, landscaping, repairs etc., all of which preserve the value of the taken property.

Another so-called "municipal relief" measure would have permitted municipalities to tax so-called "development rights" that have been reserved by a declarant of a condominium. REBA successfully opposed this proposed amendment to G.L. c. 183A §14, because it was overly broad, and would have significant negative impacts on the marketability of condominium units in the Commonwealth and, in many cases, interfere with a condominium association's ability to complete a stalled project. The language of the bill as drafted would subject to taxation as a separate taxable parcel, any interest that is "adverse to the interests of the unit owners." The assessment and taxation of these interests as separate taxable estates would lead to unjust and unworkable results. REBA's Legislation Committee worked with CAI's able local counsel, Tom Moriarty and Matt Gaines, in developing the arguments against this legislation.

Finally, legislation to provide for a temporary two-year extension for certain validly issued permits, approvals or determinations from any municipal, regional or state governmental entity concerning the use or development of real property was passed with the support of REBA. Section 173 of Chapter 240 of the Acts of 2010, applicable to permits issued at any time between Aug. 15, 2008, and Aug. 15, 2010, effectively extends a permit for an additional two years beyond its normal expiration date. This legislation, part of an economic development package, was inspired by the slowdown in the real estate market, particularly related to the inability of projects to obtain or retain financing. The extension legislation does not apply to comprehensive permits issued under G.L. c. 40B, nor does it affect the ability of a permit-granting authority to revoke or modify a permit, approval or extension for failure to comply with conditions that were part of the approval. Also, a successor to the original developer will not be entitled to the extension if he does not abide by commitments that were made by that developer.

A practicing real estate lawyer, Ed Smith has served as legislative counsel to the Association for over 20 years. He can be reached at ejs@ejsmithrelaw.com.

# Preserving affordability in 'expiring-use' properties

BY FELICITY HARDEE

Owners, lenders and attorneys involved with multi-family affordable housing financed under various federal and state programs should pay careful attention to affordable housing preservation legislation recently enacted in Massachusetts. The law, G.L. c. 40T, imposes new obligations on owners of housing for which affordability restrictions are about to lapse. Lawyers representing such owners should be aware that Chapter 40T gives the state broad powers to purchase "expiring use" properties. Owners are prohibited from selling to others without complying with the law. Furthermore, compliance with the statute is challenging and requires significant lead time. Inasmuch as the Department of Housing and Community Development (DHCD) "may take such equitable action as is necessary to… effectuate the purposes of the Act," particular care should be taken to follow the required steps to avoid later entanglements with the Commonwealth.


Felicity Hardee

Chapter 40T is a response to a flood of affordable housing expirations expected to occur in the next five years. The Community Economic Development Assistance Corporation (CEDAC) estimates that Massachusetts has already lost more than 13,000 subsidized units because owners have prepaid their subsidized mortgages; another 19,000 units may be converted to market rate by the end of 2012. This phenomenon is happening nationwide as owners with projects financed with federal and state assistance in the 1970s and 1980s pay off their mortgages and opt out of maintaining housing as affordable.

The goal of Chapter 40T is to reduce the loss of affordable project. The act applies to "publicly-assisted housing" and such housing is mostly constituted of affordable projects built 20 years ago. The statute defines "publicly-assisted housing" as projects developed under the Low Income Housing Tax Credit (LIHTC) program, units constructed under section 236 of the National Housing Act and apartments supported by Section 8 project-based vouchers. Also affected are dwelling units developed under the State Housing Assistance for Rental Production program and housing projects under G.L. c. 121A, if the affordability of the units is restricted.

Compliance with the statute begins two years before the expiration of the affordability restriction. The statute provides that "not less than two years" before the termination of affordability, an owner shall notify its tenants, CEDAC, the Department of Housing and Community Development and the town in which the property is located of the pending lapse of affordability. This is a notice of termination; a second notice of intent to complete termination is required if the owner intends to allow the affordability restriction to lapse. It is critically important that nonprofit developers understand that they are required to comply with G.L. c. 40T, §2. Even those owners who intend to maintain the affordability of their housing are required to provide notice.

If the owner of the property intends to sell it, the next step in compliance requires that it be offered first to DHCD for sale. This process commences with a written offer to the department. The department has 90 days in which to submit a response to the offer which may be either an acceptance or a counteroffer.

Chapter 40T is a response to a flood of affordable housing expirations expected to occur in the next five years.

The department may also require the seller to provide various due diligence materials, including existing architectural plans, monthly operating expenses, utility bills, financial statements and the like. Interestingly, title and environmental reports and plans are not among the enumerated materials to be provided to DHCD as items of "due diligence." If DHCD does not respond within 90 days or the parties are unable to enter into a mutually acceptable agreement, the seller then has a two-year window to enter into an agreement with a third party. If there is no sale within two years, the owner must start the compliance process over again if it seeks to sell the property later.

If a seller enters into a purchase agreement with a third party, it must then, once again, notify DHCD and give it the opportunity to preserve affordability by acquiring the project. The department may, within 30 days, sign an agreement with the same terms and conditions as that contained in the third party purchase agreement, albeit with certain exceptions. For example, if DHCD and the seller enter into a purchase agreement, the deposit for securing performance is limited and is refundable for 90 days. Furthermore, the time for performance shall be no less than 240 days (eight months) from the execution of the contract. There is no penalty imposed on DHCD for its failure to perform (other than whatever terms the parties negotiated regarding the forfeiture of the deposit). If DHCD does not purchase the affordable housing project and the transaction closes with a third party, the purchase agreement and the deed must certify that there no other special "side" agreements between the seller and the buyer.

Section 6 identifies several circumstances where parties may be excused from offering the property to DHCD for sale. These include parties foreclosing an existing mortgage and a "proposed sale to a purchaser pursuant to terms and conditions that preserve affordability." Parties who believe their transaction is exempt may seek a certificate of exemption and recently promulgated regulations set forth the process for obtaining such a certificate. Like the law, the regulations are detailed and provide for a multistep process for department review of the applicant's request. The regulations provide for a preliminary and then a final certificate of exemption, the latter being recorded with the registry of deeds.

The statute also provides an avenue for a seller to obtain a certificate of compliance. While an owner is not required to obtain a compliance certificate, given the complexity of the statutory and regulatory requirements, it would appear that buyers, lenders and title insurance companies may require a certificate of compliance when closing on the purchase of publicly-assisted housing.

While the properties affected by Chapter 40T are a small segment of the Massachusetts housing market, the requirements of the statute and the regulations promulgated under it are comprehensive and onerous. Owners of publicly-assisted rental housing should carefully review the law and plan well in advance for the notices required by the statute. Additionally, lawyers representing owners of "expiring use" property should develop early on the timeline for the notices and the offers to be made to DHCD. The team should also analyze the process for obtaining a certificate of exemption and, if the property is or will be sold without affordability restrictions, determine whether to pursue a certificate of compliance. A thorough understanding and complete timeline of the statutory requirements will facilitate transactions involving "expiring use" properties.

A member of the association's affordable housing committee, Felicity Hardee is a partner at Bulkley, Richardson and Gelinas, LLP and chair of the firm's real estate department. She can be contacted at fhardee@bulkley.com.

# Quick draw arbitration: When time is of the essence

BY SANFORD F. REMZ

As lawyers and clients know all too well, real estate litigation is an often arduous process that exhausts both sides financially and otherwise. Often clients and their lawyers see no alternative to slogging it out until one or both parties collapse from exhaustion and financial strain. In the end, many a client who has "won" asks if the win truly was a victory. More important than winning is securing a clear resolution within a timeframe and at a cost consistent with the parties' business objectives. This result is especially vital in real estate disputes, where certainty of ownership of property is critical.


Sanford F. Remz

Let's assume a buyer balks at closing on a purchase of a commercial property, the purchase and sale agreement does not have an arbitration clause and the seller seeks to force the buyer to consummate the transaction. The buyer sues for specific performance in Superior Court, facing years of litigation while the status of the property hangs in the balance. At this point creative lawyers may explore an alternative solution, such as "quick draw' arbitration, to reduce the risk and expense for their clients. With apologies to Coach Lombardi, sometimes winning is not the only thing, even in litigation.

## A CASE STUDY OF "QUICK DRAW" ARBITRATION

Buyer and seller enter into a P&S agreement for the sale of a commercial building for several million dollars. The agreement includes a closing date and standard time of the essence provision, as well as various closing conditions.

Perhaps out of seller's remorse, the seller asserts that one of the closing conditions had not been met and gives notice that it would not attend the closing. The buyer disagrees and attempts to preserve its rights by proceeding towards closing.

After the seller's non-appearance, the buyer begins an action for specific performance in Superior Court. The buyer also obtains a lis pendens, effectively tying up the property until the conclusion of litigation. A final resolution in Superior Court will likely take two to three years, not including appeals.

Given the lis pendens, the seller cannot sell or refinance the property. The seller faces protracted litigation with an uncertain outcome. An adverse order of specific performance following years of litigation could be costly. Because the property could appreciate during the course of the litigation, the seller could be forced to sell at far below market. However, even a win in litigation, that is, a denial of specific performance, could be costly. The market could suffer a downturn and the seller would then be stuck with a less valuable property, compared to the original sale price.

To avoid these risks, the seller's counsel suggests "quick draw" arbitration. The seller then proposes that litigation be stayed and the parties proceed directly to binding arbitration, despite the lack of an arbitration clause in the P&S agreement. The parties will negotiate a customized arbitration agreement designating a single arbitrator and a one-day hearing to occur within 30 days. Discovery will be limited to an exchange of transaction files. Given its similar interest in certainty and a speedy resolution, the buyer agrees. Importantly, the parties readily agree on the arbitrator, an individual both parties trust as fair and experienced.

The arbitration hearing occurs within a month. At the hearing, the parties present their cases within one full day. As the testimony develops, it becomes clear that the seller is unlikely to prevail. At the close of evidence, the arbitrator verbally renders a reasoned award: specific performance for the buyer.

Having perhaps experienced seller's remorse once, will the seller now suffer further remorse over the result of arbitration? While the seller would have far preferred an award in its favor, it ends up in an acceptable position with little remorse about the process. At closing the seller receives the original several million dollar purchase price after a delay of no more than a month and after spending a modest amount in legal fees. It could have been much worse.

Would the seller would have been better off litigating in court with far more time to develop its case through discovery? Rather than spending much time and money in litigation in the hope of obtaining a different result, we believe that seller is much better off learning of the weaknesses in its case sooner.

Of course, quick draw arbitration and other alternative dispute resolution mechanisms may not be appropriate in every situation. Lawyer and client must consider the circumstances of each dispute to determine what path is best. Indeed, before a dispute even arises, lawyers negotiating a P&S agreement should consider including a quick draw arbitration provision designating an organization such as REBA Dispute Resolution, Inc. as the arbitration provider.

Sanford Remz is managing shareholder of the Boston-based business litigation firm of Yurko, Salvesen & Remz, P.C., which has served as long-time counsel to REBA. He concentrates on business litigation matters, including real estate, securities, shareholder and corporate control and partnership disputes. He can be contacted at SRemz@bizlit.com.

## BOLAN

CONTINUED FROM PAGE 6

post on a blog or on Twitter that they aren't revealing any attorney-client confidences. Your tweet about a case could disclose information that you would not otherwise think is risky, but the ease and familiarity of use in a society where the pressure is to move fast or die is inherently risky.

Facebook and LinkedIn and other sites allow anyone to peruse fellow members' networks and connections. Letting someone into your network means your data can be mined. That may be fine, but not if it contains information about clients or contacts that you do not want someone else to use or misuse.

Notwithstanding First Amendment protections, one can imagine a bar complaint filed by an "aggrieved" person for statements made by a lawyer in a blog, a listserv, a chat room or a virtual world. A missive in cyberspace belies the discretion borne of patience found in old-fashioned letters. Note that lawyers are subject to regulation for conduct occurring in one's private, as well as professional, life.

The risks and rewards in cyberspace parallel conventional world activity. Boldly go where lawyers have not gone before, but look before you leap!

Jim Bolan is a partner with Brecher, Wyner, Simons, Fox & Bolan, LLP, with principal offices in Newton, and offices on Cape Cod and the North Shore. He represents lawyers and law firms in Board of Bar Overseers and malpractice matters, partnership breakups, departures and law firm litigation. He can be contacted at jbolan@legalpro.com.

# Relocated Land Court now open in Pemberton Square

On Dec. 13, 2010, the Land Court officially opened for business at the High Rise (Suffolk County Courthouse) at Three Pemberton Square, Boston.

The court occupies floors 4, 5 and 11. The public counter of the Recorder's office is located on the fifth floor. People wanting to file new cases or papers in existing cases, obtain copies of documents, review case files, use the public access computers to check case dockets, or obtain information from court staff, including staff in the Survey Division, should come to the fifth floor public counter.

People coming to meet with title examiners for deed approvals and other registration matters may go either to the front counter, or directly to the title examiners' office area on the fifth floor, in the hallway to the right of the front counter.

The Land Court is open each weekday, including Evacuation Day (March 17) and Bunker Hill Day (June 17) from 8:30 a.m. to 4:30. p.m. While the court remains open between 1 p.m. and 2 p.m., for filings and emergencies, the public is asked to call ahead before coming in if you need to meet with staff or a judge during the lunch hour. The court's current staffing level requires that work during the lunch hour is limited to filings and emergencies.

Courtrooms 401, 402, 403 and 404 are located on the fourth floor, and Courtrooms 1101 and 1102 are located on the 11th floor. If you arrive at the court and are unsure of what courtroom you are looking for, please go directly to the fifth floor, where the daily list is posted at the public counter.

As always, the Land Court welcomes your feedback on how things are working at the new location and other matters. Please send e-mails to Recorder Deborah J. Patterson at deborah.patterson@jud.state.ma.us.

# After *Epstein v. Board of Appeals of Boston*:

## Engage an expert to prove aggrievement challenging a local zoning decision?

BY KEITH E. GLIDDEN

The issue of whether an expert is needed to prove aggrievement under G.L. c. 40A has certainly received attention in case law since the Supreme Judicial Court's opinion in *Standerwick v. Zoning Bd. Of Appeals of Andover* (2006). To the delight of land developers, the tide of case law seems to have generally swung in their favor. With regard to a claim of harm from a diminution in property value, there has been heightened scrutiny of claims of such aggrievement, including greater attention to whether the claim of diminution was a harm intended to be protected by the applicable zoning and the requirement that the claim of diminution of value be supported by expert evidence. The decision in *Epstein v. Board of Appeals of Boston* (2010), however, made it easier for a plaintiff to prove standing based on harm caused by a diminution in market value of a plaintiff's property.


Keith E. Glidden

*Epstein* presents the very familiar scenario in zoning cases: Boston's Board of Appeals granted, among other relief, variances to allow a developer's project that would replace a one-story commercial building with a four-story residential condominium building. The abutting property owners (a real estate trust) appealed the decision claiming that they were persons aggrieved because the project would harm their property "by loss of light, air, view and resulting diminution in value."

The trial judge determined that the abutters failed to demonstrate any reasonable chance of proof of those injuries. The Appeals Court, while stating that "[n]o doubt arises that, as a matter of the law of aggrievement, [the plaintiffs are] asserting harm to recognized interests in light, air, view, and market value attached to his four abutting units," found that the judge erred in entering judgment against the abutters for failing to establish standing as the defendant failed to show competent evidence to rebut the presumption of standing involving claims of harm from loss or air, light and view, and a genuine issue of material existed to prevent disposition on summary judgment on the issue of whether the plaintiffs' testimony on the diminution in their property value was sufficient to establish standing.

On the claim of diminution in market value, the trial judge determined that the personal opinion of the abutters on their claim of diminution value in their property from the proposed development was "speculative and conclusory." The Appeals Court disagreed, stating that the trial judge's "characterization overlooked a settled and discrete rule of evidence conspicuously applicable to the circumstances." A nonexpert owner of property may testify to its value upon the basis of "his familiarity with the characteristics of the property, his knowledge or acquaintance with its uses, and his experience in dealing with it."

A plaintiff should not, however, blindly rely on the court's opinion in *Epstein* to express his/her own opinion to support a claim of diminution of real estate value.

First, an opinion of whether real estate has experienced a diminution of value may require more expertise than the familiarity an owner has with the characteristics of the property and the knowledge of its uses, such as the effect of external factors on real estate value, the neighboring community, the off-site effects of a proposed project and knowledge of the real estate market. Although the court found "[n]o principled distinction bars the extension of the knowledgeable owner rule to the subject of zoning aggrievement," there is a distinct factual difference between the cases cited by the court in *Epstein* that may pose problems for a plaintiff in establishing his/her burden on a challenge to standing. The cases cited by the court dealt with eminent domain, and damages to personal and real property, all of which most often involve the present value and current condition of the property. In zoning cases where the claim is a diminution in value, the evidence must be an opinion of the decrease in value, which includes the present value and a future value based on a project off the plaintiff's property, which has not yet been built. These distinctions in any given cause may present areas of knowledge that are outside a layperson's ability to opine.

Second, in stating that "[i]n the trial setting, the judge will rule preliminarily upon the qualifications of the owner," the Appeals Court reiterates the established law in the cases upon which it relies that the competency of a plaintiff's opinion as evidence of the diminution of value of his/her property under this rule would still get "gate keeper" scrutiny from the judge. Thus a plaintiff may not be able to maintain a claim of standing because he/she failed to articulate reasons, beyond mere speculation, to support a conclusion that his/her property will experience a diminution in value that are linked to the proposed project. A defendant/developer should seek discovery of the substance and basis of a plaintiff's opinion of the diminution of value similar to discovery regarding experts to challenge the plaintiff's competence to testify to an opinion of diminution in value.

The most significant part of the *Epstein* decision ultimately rest on the specific facts behind the abutters' opinion. First, the Appeals Court noted that discovery established that both plaintiffs had experience in real estate development, rehabilitation and management in the area. Additionally, one plaintiff had been engaged in real estate brokerage since 1986 holding brokerage licenses in Massachusetts, California and Arizona, and had taken coursework in real estate appraisal for renewal of his brokerage licenses. Such qualifications are often established by an expert who is to give an opinion on diminution in market value. Second, the court noted that the summary judgment record contained specific factual support for the opinion. In the deposition of one plaintiff, he testified that one of his second-floor units overlooking the undeveloped space rented regularly at the monthly rate of $1,500, while an identical unit one floor higher on the opposite side of the building and facing a wall 10 feet away rented with difficulty at a monthly rate of $1,100. He testified that concluding "a 15 to 20 percent loss of rental value for the affected units… [is] a 'no-brainer' resting upon the usual reasonable inference that a room with a view is more desirable and valuable than a room without one. Therefore, in *Epstein*, the plaintiffs' own property showed support for harm cause by a diminution in value that was correlative to the claim of aggrievement related to the yet to be developed project abutting their property and subject to the zoning appeal.

The court in *Epstein* continues to show that a plaintiff's evidentiary decisions in the face of a challenge to standing is a case-by-case, fact intensive inquiry and that the determination of whether standing exists to challenge a local zoning decision depends as much on the parties' development of their respective cases on aggrievement as it does the application of the myriad of case law in this area of the law.

Keith Glidden practices in the litigation, environmental and real estate practice groups in the Boston office of Verrill Dana LLP focusing on environmental, real estate and land use litigation, and is a member of REBA's Environmental Committee. He can be contacted at kglidden@verrilldana.com.

# Foreclosure due diligence now vitally important

BY JOEL A. STEIN

*The increase in foreclosure activity has brought intense scrutiny by state regulators, consumer groups and title insurance companies. This article will examine some issues of concern for conveyancers when reviewing a foreclosure transaction.*

* * *

There was something rotten in Denmark. Denmark, Maine, that is, and a desperate homeowner facing foreclosure contacted Pine Tree Legal Assistance, a provider of legal services for low-income Maine residents.

The file was assigned to Thomas Cox, a retired Maine attorney, who had worked on foreclosure cases for Maine National Bank. Cox claims to have noticed almost immediately that the foreclosure file did not look right; the documents from the lender had been approved by an employee whose title was "limited signing officer."

Enter Jeffrey Stephan, a 41-year-old resident of Sellersville, Penn., and the team leader of a 13-person department of GMAC Mortgage. Stephan, who has been assigned the super villain moniker of "robo-signer," signed off on as many as 10,000 foreclosures a month for GMAC.

Although Stephan had previously been deposed, it became clear that, contrary to the statements set forth in the affidavit, he had no personal knowledge of the facts stated in the foreclosure affidavit; that he did not have custody and control of loan documents; that he did not review the exhibits attached to his affidavit; and that he did not appear before a notary public.

The revelation that a "robo-signer" had signed off on foreclosures without reviewing the paperwork forced Ally Bank, which is owned by GMAC, to halt foreclosures in all 23 judicial foreclosure states. Soon after, other major banks, including JPMorgan Chase and Bank of America, also halted foreclosures, initially in the 23 judicial states and subsequently in all 50 states.

A flurry of activity followed. Old Republic National Title Insurance Company announced that it would not insure title to properties foreclosed by GMAC. Fidelity National Title Insurance Company entered into an unusual Master Indemnity Agreement with Bank of America to "facilitate the underwriting process of insured sales in which Bank of America and its affiliates is the lender or servicer."

Following internal investigations by the nation's largest lenders, foreclosure proceedings resumed. Despite the conclusion by the lenders that errors were minimal or non-existent, state and federal regulators, as well as the media, were unconvinced.

Attorneys general from all 50 states have joined to form the Mortgage Foreclosure Multistate Group. This group, which also includes mortgage regulators, issued a statement on Oct. 13, 2010, which states in part, "It appears affidavits and other documents have been signed by persons who did not have personal knowledge of the facts asserted in the documents. In addition, it appears that many affidavits were signed outside the presence of a notary public, contrary to state law. This process of signing documents without confirming their accuracy has come to be known as 'robo-signing.' We believe such a process may constitute a deceptive act and/or an unfair practice or otherwise violates state laws."

Joel Stein (pictured here with his spouse, Cathy Smenton at a REBA annual meeting and conference luncheon) received REBA's lifetime achievement award, the Richard B. Johnson Award, in 2007. Joel co-chairs the association's title insurance and national affairs committee.

## MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Questions concerning foreclosure practice raised by state courts, attorneys general and consumers led regulators to investigate Mortgage Electronic Registration Systems, Inc. (MERS).

Since the advent of MERS, conveyancers have debated the treatment of MERS as a mortgagee and have questioned the failure of lenders to endorse the note as the mortgage is internally transferred and re-transferred within the MERS system.

When a foreclosure is initiated, the mortgage is assigned by MERS to the present holder. The original mortgage may run to MERS as nominee for X and the recorded assignment may run from MERS to Y. The assignment from X to Y was off the record. This failure to record assignments has caused the state of Tennessee, by a Realtor, to bring a *qui tam* suit against MERS, alleging that the "defendants were concealing and avoiding the payment of recording fees or other monies to the above named counties in this and other states…"

A recent opinion of the Maine Supreme Judicial Court held that MERS could not institute a foreclosure action and invoke the jurisdiction of the Court because it lacked enforceable right in the debt that secured the mortgage. See *Mortgage Electronic Registration Systems, Inc. v. Jon Saunders, et al* (2010).

More recently, the register of deeds for the Essex County (Southern District) Registry of Deeds, John L. O'Brien Jr., contacted Attorney General Martha Coakley and requested that her office investigate MERS, claiming that MERS has created its own registry of deeds and has thus deprived the Commonwealth of recording fees.

The most serious allegations have been raised by two law professors, Adam Levitan of Georgetown University and Christopher L. Peterson of the University of Utah. As reported in *The New York Times* in October 2010, Peterson has questioned MERS' attempt to have it both ways, acting as an agent in some cases and as a mortgagee in others.

If MERS were a mortgagee, it could record loans in its own name, but since it does not own the loan it would violate the basic tenet that the assignment of the note carries the mortgage with it.

"If the assignment of the note is a nullity, then the mortgage can no longer be enforced. The borrower would still owe the money, but no foreclosure would be possible and the borrower could still sell the house without paying off the mortgage," he told the *Times*.

As an agent, MERS cannot list itself as mortgagee because various state laws require transparency and do not have provisions authorizing the use of shell companies.

Peterson further argues that local governments might sue MERS to collect recording fees and that this would have been avoided if legislation had initially been sought when MERS was created and if parties "followed the simple policy of specifying in the documents who owns what, a vast amount of confusing litigation and commercial uncertainty could have been avoided."

The future of MERS seems uncertain, as lawyers for homeowners allege that MERS does not properly track the required paper trail to prove mortgage ownership. In October 2010, JPMorgan Chase Bank's CEO stated that the bank had stopped using the MERS system.

## REO SALES RISK ASSESSMENT

Several title insurance underwriters have alerted agents insuring sales of REO properties. Agents must closely examine the foreclosure process and review or complete an REO Sale Risk Assessment Questionnaire. All questions must be answered with a yes or no, and the form must be dated and signed by the agent and maintained in the title file.

If all questions are answered in the negative, the agent may issue a commitment or policy, subject to any other risk limitations that may be applicable. If any question has a positive answer, the underwriter must give specific written approval to issue.

In addition to this questionnaire, several underwriters require a buyer's affidavit in addition to the typical mechanic's lien affidavit. The buyer must affirm that he has visited the property, inspecting it inside and outside, and saw no tenants or other parties in possession; and no evidence of work being performed on the property.

## TITLE INSURANCE

Historically, title insurance underwriters have been a favored whipping boy for the major media publications, most of which question whether anyone has collected on a title insurance policy. As noted in an Oct. 8, 2010, article in *The New York Times*, "It ultimately feels like a tax – an extortionate one at that – and not a protective measure."

Today, however, title insurance is viewed as a valuable commodity. In Massachusetts, those who purchased owner's title insurance policies now breathe easier if their title is clouded by an *Ibañez* situation. Nationally, those who have purchased title from foreclosing lenders whose interest in the mortgage may now be questioned can also breathe easier. Still, even articles that admit to the value of an owner's policy of title insurance still acknowledge that title insurance remains a mysterious proposition for homebuyers.

Real estate mortgage foreclosures have always required careful and diligent scrutiny by conveyancers. Today, conveyancers must not only be aware of the various quirks, i.e. Special Notice to the Internal Revenue Service and Special Notice pursuant to MGL c. 61A, but should also check all foreclosed parties for bankruptcy; determine all foreclosure documents were properly executed and authorized; and determine whether the property being foreclosed is presently vacant.

Joel Stein chairs REBA's Title Insurance and National Affairs Committees. He is a frequent and welcome commentator in these pages, and can be contacted at jstein@steintitle.com.