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REBA news
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GUEST COLUMN

SJC to mortgagees: Keep your docs in a row

Larrry Heffernan

State rules on foreclosure by mortgage assignee under securitization trust

BY LAWRENCE P. HEFFERNAN

In a widely followed and reported decision, which has been the subject of considerable media commentary, the Massachusetts Supreme Judicial Court ruled that two banks that held mortgages as trustees of securitization trusts did not have the right to foreclose those mortgages based upon inadequate documentation of mortgage assignments and transfers. The court, however, left the door open to establishment of the chain of assignments required for foreclosure authority through proper securitization and mortgage purchase documentation.

Massachusetts is not a judicial foreclosure state. Except for a limited judicial proceeding to determine whether the mortgagor is a beneficiary of The Service Members' Civil Relief Act of 1940, 50 U.S.C. §§ 501-596, a mortgage holder can foreclose on a property by exercise of the statutory power of sale.

See SJC, page 3

Task force seeks common ground after foreclosure crisis, decisions

BY LAUREL H. SIEGEL AND ELIZABETH J. BARTON

The foreclosure crisis and recent judicial decisions across the country have led to a number of bills being submitted by various organizations in the most recent legislative sessions to modify Massachusetts foreclosure laws and procedure. The Massachusetts Bar Association established the Joint Foreclosure Legislation Task Force to bring together many of the entities who deal with mortgage and foreclosure issues in an attempt to work through the many competing interests and issues in the legal system in Massachusetts which affect homeowners and lenders.

Laurel Siegel

Beth Barton

The task force has the lofty goal of improving and modernizing mortgage and foreclosure law in Massachusetts. The task force includes representatives from the Massachusetts Bar Association's Property Law Section Council and Access to Justice Section Council; the Real Estate Bar Association of Massachusetts's Legislative Committee; Greater Boston Legal Services; Western Mass. Legal Services; the Massachusetts Bankers Association; and the Massachusetts Mortgage Bankers Association, as well as representatives from individual lending institutions, renowned professors from local law schools, and a variety of attorneys. The task force is chaired by Elizabeth J. Barton and Laurel Siegel, attorneys with years of title and conveyancing experience, who are acting as organizers and moderators.

See MBA, page 9

WALK TO THE HILL

REBA co-sponsored the Equal Justice Coalition's 12th Annual Walk to the Hill for Civil Legal Aid in February. Pictured at the State House (from left to right): Edward J. Smith, the association's legislative counsel; Mary K. Ryan, board member; Edward M. Bloom, REBA president and Christopher S. Pitt, president-elect.

Marilyn Dupuis, title examiner in Plymouth County, will be honored by REBA on May 2.

Plymouth County title examiner Marilyn Dupuis to be honored

Marilyn Dupuis, who has abstracted real estate titles at the Plymouth County Registry of Deeds for nearly 60 years, will be honored at REBA's Spring Conference on May 2 in Westborough.

Dupuis began title examination when she was a senior in high school in the 1950s, coming into the registry after school."What is so unusual is that she is so very, very thorough, as you have to be in this business," said Richard Serkey, co-chair of the REBA Title Standards Committee, who has known Dupuis since the 1970s. "She has the kind of curiosity that you need, to turn the next page and follow every lead."

From the early days when work was all completed by hand with tracing of plans, through the advent of photocopying and now digital scanning, Dupuis has evolved with the technology, yet maintained an uncanny ability to decipher even the most archaic script of the earliest registry clerks.

The affordable condominium conundrum

BY EDMUND A. ALLCOCK

On Oct. 7, 2010, Judge Charles Trombly of the Massachusetts Land Court issued a much-anticipated decision in the case of *Ambrosini v. Cawley* (2010), involving the interplay between the establishment of percentage interests in a condominium and the assessment of condominium fees under the Condominium Act and affordable housing restrictions. In *Ambrosini v. Cawley*, certain owners of the Clarendon Warren Condominium located in the South End of Boston, who had affordable restrictions on their units because they bought into the condominium via a Boston Redevelopment Authority Affordable Housing Program in 1988,

Ed Allcock

See *AMBROSINI*, page 8

PRESIDENT'S MESSAGE

A salute to our supporters

BY EDWARD M. BLOOM

Recently, I heard about an association of real estate attorneys in North Carolina which used REBA as a model for its new organization. Naturally, it pleases me when outsiders think we're doing such a professional job that they're willing to build their organizations on outlines similar to ours. As they say, imitation is the sincerest form of flattery. Because we are so close to the source, we sometimes lose sight of all that we have done in REBA's name during its 150-year history. The list is long, accomplished and ground-breaking. We have helped create law, clarified law and assisted in making law more accessible to real estate practitioners. And we're not through yet by any means.


Ed Bloom

When we speak with attorneys one-on-one, we are consistently thanked for our efforts and urged to continue to lead the battle to prevent the unauthorized practice of law. That fight is only one of REBA's many endeavors, but it has consumed an inordinate amount of time and money.

It is often said that we discover our true friends in times of stress or crisis. This is as true for entities like REBA as it is for individuals. There is no doubt that the severe economic recession of the last few years has had a profound effect on REBA and its members. And yet in every storm, there are rays of hope and light. Nothing that we have accomplished would have been possible without the support of the members, sponsors and countless practitioners who volunteer their time and skills to improve the profession. We are especially grateful to all those people who continue to pay their membership dues during these very financially challenging times. Without a significant dues-paying membership, we would have to fold up our tents and go home.

We frequently try to thank our REBA members, small and large firms alike, but this time, I want to publicly acknowledge a special group of large law firms and title insurance companies that support REBA by maintaining memberships for a significant number of their transactional practitioners. Those firms include:

- Robinson & Cole, LLP
- Chicago, Ticor, Lawyers, Commonwealth Title
- First American Title Insurance Co
- Rackemann, Sawyer & Brewster, P.C.
- Goulston & Storrs, P.C.
- Holland & Knight, LLP
- Sherin and Lodgen, LLP
- Burns & Levinson, LLP
- Nixon Peabody, LLP
- Nutter, McClennan & Fish, LLP
- Seyfarth Shaw, LLP
- Stewart Title Guaranty Company
- Bowditch & Dewey, LLP
- Marsh, Moriarty, Ontell & Golder, PC

We are also grateful to those very small firms who are batting a thousand in their support of REBA through their solid membership. As you will hear me say over and over, nothing we do here at REBA is possible without you and everything is possible with your continued support. Thank you again, as we look forward to a brighter 2011.

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.

Ethical concerns with serving as broker and attorney in the same transaction

BY ROBERT T. GILL AND JENNIFER L. MARKOWSKI

For a small fee, a Massachusetts licensed attorney may obtain a real estate broker's license. The ease with which an attorney can become a licensed broker, combined with the potential for additional revenue, makes maintaining a real estate brokerage business in addition to a law practice an attractive option, particularly for real estate attorneys. Since most real estate transactions involve both attorneys and brokers, a very logical question is whether it is proper for an attorney to serve as both broker and attorney in the same transaction. Serving in dual capacities in the same transaction creates a conflict which in most circumstances, if not all, is ill-advised, if not actually prohibited under the particular circumstances of the transaction. At a minimum, the attorney must make detailed disclosures explaining to his client the conflicting loyalties that his position as broker creates and he must obtain written consent from the client in order to proceed with the transaction.

Depending on which party the attorney represents and the terms of the brokerage agreement, the attorney's interests as broker may appear to be largely aligned with his client's interests, but they are not. The broker's financial incentive – he is paid solely on commission and only if the sale is completed – on some level puts his interests at odds with all of the parties to the transaction. For example, title issues would likely concern both the buyer and the lender and could potentially derail the transaction. Title issues would be of no concern to a broker and the broker would be interested in closing the sale, title issues or not. The seller may have an unrealistic bottom line price and prefer to remain in the property rather than sell it if he cannot find a willing buyer. The broker would want the seller to lower his asking price to whatever figure will close the deal. As broker, such inclinations are expected. However, once the broker takes on the role of attorney to one of the parties, that party's expectations and the broker's obligations to the client obviously change. The broker/attorney's competing personal interest has the potential to interfere with his ability to act diligently and in a manner that is consistent with his client's best interests.

Rule 1.7 of the Massachusetts Rules of Professional Conduct prohibits an attorney from representing "a client if the representation of that client may be materially limited by …. the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."

The first step of the analysis is whether the attorney subjectively believes he can represent the client without being influenced by his own financial interests in the particular transaction. If the attorney has any doubt as to his ability to set aside his own personal interests in order to zealously protect his client's interests, he must obviously decline the representation.

If the attorney concludes his ability to represent the client will not be impacted, he must then conclude that an objectively reasonable attorney would agree. In other words, if the client consulted with an independent attorney, what would he say? The particular circumstances of the transaction are an important factor in the analysis. However, it is important to consider why the client wants to use the broker as his attorney, rather than another attorney unrelated to the transaction.

If, under the circumstances, the attorney concludes that an objectively reasonable attorney would not advise against the representation, the attorney must disclose and adequately advise the client of the nature of the conflict and obtain the client's informed consent to proceed with the transaction. Specifically, in order to obtain informed consent, the client must understand the nature of the attorney's interest in the transaction and the potential for his interest to influence the attorney's decisions.

Although Rule 1.7 does not require the consent to be in writing, because the broker agreement constitutes a business transaction, the situation is further governed by Mass. R. Prof. C. 1.8, which requires written consent. See *In the Matter of Ann W. Lake*, (1998), wherein a brokerage agreement is a business transaction. Rule 1.8 provides, in pertinent part:

"A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing thereto...."

Thus, not only must the attorney fully disclose the conflict and explain it to the client, he must obtain consent from the client in writing after giving the client a reasonable opportunity to consult with independent counsel. Further, throughout the transaction the attorney must be mindful of the potential for an unantici-

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

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.

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SJC: Court rejected 'mortgage follows the note' rule

CONTINUED FROM PAGE 1

Massachusetts is also a title theory state, which treats a mortgage as a conveyance of legal title to the property. Thus, a mortgage and any subsequent assignment must be in writing to satisfy the Massachusetts Statute of Frauds.

Ibañez arose out of two mortgage foreclosures by two different banks as trustees of securitization trusts. The history and trail of the mortgages are lengthy but important to the court's analysis. The Ibañez mortgage was initially granted to Rose Mortgage Inc. which executed an assignment of the mortgage in blank. That assignment was subsequently stamped with the name of Option One Mortgage Corporation and recorded. Option One, in turn, executed an assignment of the mortgage in blank. According to U.S. Bank, Option One assigned the Ibañez Mortgage to Lehman Brothers Bank, FSB which assigned it to Lehman Brothers Holdings, Inc. which then assigned it to Structured Assets Securities Corporation, which pooled the mortgage with approximately 1,220 other mortgage loans and assigned it to U.S. Bank as trustee of a securitization trust.

The trust agreement was not in the record, but a private placement memorandum which described the mortgage pools and the entities involved and summarized the provisions of the trust agreement was in the record. That private placement memorandum did not contain a mortgage schedule which identified the Ibañez Mortgage as one of the mortgages that were assigned in the trust agreement. U.S. Bank, as trustee, conducted a foreclosure sale on the Ibañez property on July 5, 2007, and purchased the property at the foreclosure sale. Subsequent to the foreclosure auction, on Sep. 2, 2008, American Home Mortgage Servicing, Inc., as successor-in-interest to Option One, executed a written assignment of that mortgage to U.S. Bank as trustee which was then recorded on Sept. 11, 2008.

The second mortgage in *Ibañez* was granted by Mark and Tammy LaRace to Option One, which executed an assignment of the mortgage in blank. According to Wells Fargo Bank, N.A., Option One later assigned the LaRace mortgage to Bank of America in a flow sale and servicing agreement. Bank of America then assigned it to Asset Backed Funding Corporation (ABFC) in a mortgage loan purchase agreement, and ABFC pooled the mortgage loan with others and assigned it to Wells Fargo, as trustee of the securitization trust. The mortgage loan purchase agreement from Bank of America to ABFC contained clear language assigning the mortgage, but it was not executed and it did not contain a schedule listing the assigned mortgage loans. The pooling and servicing agreement between ABFC as depositor, Option One as servicer and Wells Fargo as trustee also contained language of transfer and assignment of the mortgage, but it was not signed and did not contain loan schedules identifying the subject mortgages. The LaRace mortgage was foreclosed and sold by Wells Fargo as trustee on July 5, 2007. On May 7, 2008, Option One executed an assignment of the mortgage to Wells Fargo as trustee which was recorded on May 12, 2008, but recited an effective date of April 8, 2007, a date preceding the publication of notice of sale and the foreclosure sale.

In September and October 2008, U.S. Bank and Wells Fargo brought separate actions in the Massachusetts Land Court to quiet title to the respective properties, asking the court for a judgment that the right, title and interest of the mortgagors was extinguished by the foreclosure, a declaration that title was vested in the plaintiff banks and a declaration that there was no cloud on the title arising from the publication of the notice of foreclosure sale in *The Boston Globe*. (Ironically, the primary purpose of the lawsuits was to validate the publication of the notice of sale in *The Boston Globe*, even though the properties were located in Springfield, Mass.) The mortgagors did not answer the complaints and the plaintiff banks moved for entry of default judgment. The Land Court, however, entered judgment against the plaintiffs, ruling that the foreclosure sales were invalid and violated G.L. c.244, §14 because the notices of foreclosure named U.S. Bank and Wells Fargo as the mortgage holders, but the mortgages had not yet been assigned to them. The Land Court judge found that the plaintiff banks acquired the mortgages by assignment after the foreclosure sales and, therefore, had no interest in the mortgages being foreclosed at the time of the publication of notice or at the time of the sale.

The plaintiffs then moved to vacate the judgment and were allowed to supplement the record with the securitization and transfer documents described above. The Land Court judge eventually denied the plaintiffs' motion to vacate the judgment and affirmed his earlier decision that the plaintiffs were not holders of the respective mortgages at the time of foreclosure. The Supreme Judicial Court then took the case on direct appellate review.

Even though commentaries in the media have described the *Ibañez* decision as a "train wreck" and a disaster for the mortgage and title industries, the decision actually recognizes that mortgages can be transferred and assigned through securitization and pooling agreements so long as the documentation is proper and adequate.

The court rejected the widely accepted common law rule that "the mortgage follows the note," although it did rule that the holder of the mortgage holds the mortgage in trust for the purchaser of the note who has an equitable right to obtain an assignment of the mortgage. Under the Massachusetts statutory construct, G.L. c.183, § 21 and G.L. c.244 § 14, the plaintiff banks had the authority to exercise the power of sale contained in the mortgages only if they were assignees of the mortgages at the time of the notice of sale and the subsequent foreclosure sale. The plaintiff banks claimed that the securitization documents established valid assignments of the mortgages, but the court found that documentation lacking. In the Ibañez mortgage transaction, the private placement memo described the trust agreement as an agreement to be executed in the future – it did not contain language of a present assignment – and did not contain a schedule of loans and mortgages which identified the Ibañez mortgage. In the LaRace mortgage, the pooling and servicing agreement did use the language of a present assignment, but again, it failed to identify the LaRace Mortgage as one of the mortgages assigned.

Regardless of the shortcomings in the documentation of the Ibañez and LaRace mortgages, the court did not require that the assignments be in recordable form and ruled that securitization and pooling documents could provide the trail necessary for assignments of a mortgage and eventual foreclosure: "[w]here a pool of mortgages is assigned to a securitized trust, the executed agreement that assigns the pool of mortgages, with a schedule of the pooled mortgage loans that clearly and specifically identifies the mortgage at issue as among those assigned, may suffice to establish the trustee as the mortgage holder. However, there must be proof that the assignment was made by a party that itself held the mortgage."

Moreover, in discussing title standards for foreclosures promulgated by the Real Estate Bar Association for Massachusetts, the Supreme Judicial Court ruled that a confirmatory assignment, which is an assignment of the mortgage executed in recordable form and often recorded after the foreclosure sale, can confirm an assignment of the mortgage by pre-foreclosure securitization agreements. The Supreme Judicial Court specifically stated that "[w]here an assignment is confirmatory of an earlier, valid assignment made prior to the publication of notice and execution of sale, that confirmatory assignment may be executed and recorded after the foreclosure and doing so will not make the title defective … [w]here the earlier assignment is not in recordable form or bears some defects, a written assignment executed after the foreclosure that confirms the earlier assignment may be properly recorded."

Thus, even though commentaries in the media have described the *Ibañez* decision as a "train wreck" and a disaster for the mortgage and title industries, the decision actually recognizes that mortgages can be transferred and assigned through securitization and pooling agreements so long as the documentation is proper and adequate. The decision also recognizes that alternative foreclosure by entry may provide a separate ground for clear title apart from foreclosure by execution of the power of sale. (Under G.L. c.244, §§1 and 2 a mortgage holder who enters a property and remains for three years after recording a certificate or memorandum of entry forecloses the mortgagor's right of redemption.)

Larry Heffernan, a former chair of the association's litigation committee, is a partner in the Boston office of Robinson & Cole LLP. His practice includes litigation in the real estate, title insurance, commercial and banking areas. Larry can be reached by email at lheffernan@rc.com.

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Keeping the 'fair' in fair value

Amendments to condo statute require assessment of operational impacts of affordable housing

BY DIANE R. RUBIN

Last July, the Legislature amended the Massachusetts Condominium Statute to clarify how developers may structure condominium master deeds when a condominium includes affordable housing units. The amendments to Sections 5 and 6 of Chapter 183A make it clear that a developer can take affordable housing deed restrictions into consideration when assigning the percentage of beneficial interest in the common areas and facilities. This flexibility is welcome news to some affordable housing advocates, but also means that developers, governmental entities and their attorneys would be well-served to think through choices and potential operational impacts on affordable housing unit owners and condominium associations.

Diane Rubin

Until these change went into effect, Section 5 of Chapter 183A provided that each unit owner in a condominium was entitled to an undivided interest in the common areas and facilities in the percentage set forth in the master deed and the percentage shall be in approximate relation that the fair value of the unit bears to the aggregate fair value of all units. Confusion and litigation arose as to what "fair value" meant for units subject to affordable housing deed restrictions. Some took the position that the statute required "fair value" be based on sales price akin to fair market value, such that deed restricted units would have a correspondingly smaller percentage interest in the common areas and facilities, along with a lower percentage of common expenses, a lower percentage of any assessments for major repairs and fewer voting rights. Others argued that "fair value" could reasonably be understood to be something different from "fair market value" and that developers could use "approximate area" as a proxy for "fair value," such that affordable housing units could have a percentage interest based upon their size, not their sales price.

These varying interpretations are now resolved. Section 5(a), as amended, expressly provides that "fair value" may "include determinations of whether and how to weigh a restriction relating to value imposed on one or more, but fewer than all units." The amendment was spear-headed by Citizens Housing and Planning Association (CHAPA), which began advocating for such change in 2005. The legislation also provides a process to amend a master deed to reset percentage interests, if and when affordable housing restrictions expire or are terminated.

The fair value amendment goes further in Section 6 by expressly permitting developers to choose between two pricing structures in master deeds. The master deed can utilize either the percentage interest or area in relation to the aggregate area of all units as the basis for determining the units' share of common expenses. This change to Section 6 essentially decouples voting rights from common area payment obligations. Developers now have an enhanced menu of options for structuring affordable housing condominiums, and can choose to base voting rights on the fair value of that unit either subject to a restriction or the fair value without a restriction. They can also choose to tie condominium fees and assessments to percentage interest (either fair market value or restricted market value) or to base condominium fees on the square footage of the units. Indeed, it is now appears to be lawful under Chapter 183A to structure a condominium such that affordable housing unit owners have voting rights equal to those market-rate unit owners, while paying lower condominium fees. Alternatively, developers may choose to assign affordable housing unit owners fewer voting rights (with a lower percentage interest), but require them to pay condominium fees and assessments equal with those market-rate unit owners.

CHAPA advocated that it was important to allow policy makers and developers the flexibility to decide what structure makes the most sense depending upon the unique circumstances of each condominium. Now that developers may factor affordable housing restrictions into fair values, it is incumbent upon developers and the governmental entities which subsidizes and regulate affordable housing to think long and hard about the long-term operational impacts of such flexibility. If affordable housing unit owners have fewer voting rights and pay lower fees and assessments than other unit owners, then this also has the potential to create a stigma and two tiers of unit owners. On the other hand, affordable housing unit owners may also have the benefit of a long-term subsidy funded by higher condominium fees for market value unit owners. Condominium documents must be carefully drafted and considered not just to expedite the sales process, but also to foster a sense of community and equity within the organization of unit owners.

Diane Rubin is a partner in Prince Lobel Glovsky & Tye LLP's litigation and real estate practice groups. She also co-chairs REBA's condominium law and practice committee. She can be contacted at drubin@princelobel.com.

BROKER/ATTORNEY

CONTINUED FROM PAGE 2

pated conflict to arise and must continue to go through the same analysis as issues arise and withdraw if changed circumstances necessitate him doing so.

Given the conflict issues (actual and potential) which arise from an attorney serving in a dual capacity as attorney and broker in the same transaction and the limited (if any) benefit to the client in most circumstances, it would seem that only rarely would circumstances warrant serving in such a dual capacity. Why would a client want an attorney to represent him when the client knows the attorney's financial motivations are at odds with his interests and when the client could easily retain other competent counsel with no conflict?

Robert Gill is a partner at Peabody & Arnold LLP. He can be reached at rgill@peabodyarnold.com. Jennifer Markowski is an associate at Peabody & Arnold. She can be reached at jmarkowski@peabodyarnold.com.

Cummings case offers lessons in lease drafting

BY KEVIN S. MURPHY

A decision by the Supreme Judicial Court in mid-2010, *Norfolk & Dedham Mutual Fire Inc. Co. v. Morrison*, contains lease drafting as well as litigation lessons for attorneys representing commercial landlords, commercial tenants and liability insurers of those businesses.

Ellen Morrison tripped and injured herself in the parking lot of her physician, Dr. Beverly Shafer. Shafer leased space in an office complex owned by Cummings Properties. Morrison sued her doctor and Cummings Properties, alleging the negligence of both.


Kevin Murphy

The lease between Shafer and Cummings had two relevant sections. The first was an indemnification provision, which stated that Shafer "shall be solely responsible as between" her and Cummings for injuries or property damage occurring in or on the leased premises and common areas, except if such injuries or damage "directly result[ed] from the sole negligence" of Cummings.

The second relevant section related to insurance. Under it, Shafer was obligated to carry a commercial general liability policy insuring Cummings against any claims arising out of the use of the property, regardless of fault. Shafer did so, listing Cummings to her CGL policy as an additional insured, for a cost of $10 per month.

Relying upon the two provisions, Cummings tendered the defense of Morrison's claims to Shafer and her CGL carrier, Norfolk & Dedham Mutual Fire Ins. Co. Norfolk commenced an action asserting that the clauses requiring Shafer to indemnify and procure insurance for Cummings violated G.L. c. 186 § 15, a statute which voids any lease provision under which a tenant agrees to indemnify a landlord from "any or all liability" arising from the fault or negligence of the landlord. The SJC found the indemnification provision void as violating the statute but sustained the insurance clause. In so doing, the court provided some important guidance for attorneys representing commercial landlords, tenants, and their liability carriers.

LAW APPLIES TO COMMERCIAL LEASES

The first question the SJC considered was whether 186 § 15 applied to commercial, as opposed to residential, leases. The court reasoned that the language of the statute is not specifically restricted to residential leases, and that the purpose of the statute, to keep landlords from contracting out of their own negligence, was not limited to residential landlords.

On its face, this reasoning may be broad enough to apply to other statutes concerning tenancy which are not textually limited to residential leases. For instance, section 186 § 15B has been held to apply only to residential leases, despite the fact that many of its clauses, containing detailed rules about the handling of security deposits, do not mention residential tenancies. Courts have held that the purpose of 186 § 15B is to protect residential tenants from misuse of their deposits, in view of their typically inferior bargaining positions. However, the statutory purpose of 186 § 15 was stated more generally, without reference to unequal bargaining power. Since it seems clear that commercial tenants may be better able than residential to protect themselves against both improper use of security deposits and indemnification requests, the difference between the two statutes is less than clear.

INDEMNIFY LANDLORDS AGAINST NEGLIGENCE

The court interpreted the first sentence of the indemnification clause as Cummings trying to restrict its own liability to instances where it was *solely* negligent, and shift to Shafer the risk in situations where Cummings' negligence combined with the negligence of others to cause injury. The SJC rejected this approach. Under the SJC's view, the language in 186 § 15 referring to liability "arising from any omission, fault, negligence or other misconduct of the landlord" means liability that arises in whole or in any part from a landlord's negligence. Any attempts by lease language to transfer any of such risk to the tenant will likely be suspect after this ruling.

TENANTS MAY HAVE A DUTY OF CARE

The court below had held that the exculpatory effects of the first sentence of the indemnification provision could not apply to this situation. The superior court reasoned that, since Cummings controlled the parking lot, Shafer could not have been liable for any defects there, and thus the case involved Cummings sole negligence, which risk remained with Cummings under the indemnity clause.

The SJC disagreed that Shafer could have no liability for Morrison's injuries, further cementing the approach in the Commonwealth that the issue of control does not always solely determine which entity may be liable. According to the SJC, if the tenant is aware of the unsafe condition, it may under the specific facts have its own duty to warn or make safe, even if the landlord controls the area in which the unsafe condition exists.

PROVISIONS REQUIRING PURCHASE OF INSURANCE ARE ENFORCEABLE

The superior court had invalidated the insurance provision as well, holding that it amounted to a transfer of risk of the landlord's negligence to the tenant. That court saw no meaningful difference between the risk-transferring effects of the indemnification provision and those of the insurance provision.

The SJC disagreed with the superior court and held the clause valid. It emphasized the key difference between the two provisions – that in an indemnity situation, the tenant will itself be responsible for the costs of the landlord's misdeeds even if completely innocent. Under an insurance clause, the costs will fall upon a liability carrier, not the commercial tenant itself. What is transferred is thus not the actual risk of the damage, but merely the cost of insuring against such risk.

The SJC was willing to allow commercial actors to negotiate the terms under which they would apportion the cost of insuring risk, which it saw as separate from the issue of overreaching landlords seeking to foist their own negligence on to innocent tenants. After this decision, these insuring provisions will be held valid despite the fact that they ultimately result in *de facto* indemnification of the landlord without regard to the landlord's fault.

Kevin Murphy is a shareholder in Yurko, Salvesen Remz, P.C., a business litigation firm which has served as the association's counsel on unauthorized practice of law matters for nearly 20 years. He concentrates in complex business litigation. He can be reached by email atksm@bizlit.com.

Widening the definition of reasonably foreseeable use

MassDEP draft AUL guidelines could significantly impact the real estate and business communities

BY JO ANN KAPLAN

New draft guidance issued by the Massachusetts Department of Environmental Protection (MassDEP) significantly changes the agency's existing guidance regarding the potential future uses of contaminated property to be considered in remediating contamination and recording land use restrictions to limit the scope of remediation.


Jo Ann Kaplan

At issue is whether MassDEP will adopt an official interpretation of the law regarding environmental cleanups that will call for virtually all contaminated sites in the Commonwealth to be treated as residential property, regardless of actual current or likely future use.

Real estate and environmental attorneys and the clients they represent will want to pay close attention to this draft revision of MassDEP's Guidance on Implementing Activity and Use Limitations (Policy #WSC 11-300), available at www.mass.gov/dep/cleanup/laws/policies.htm). The draft was issued for public review in Dec. 2010, and comments are due to MassDEP by April 1, 2011.

The guidance addresses the preparation and implementation of recorded land use restrictions known as Activity and Use Limitations, or AULs, under the state superfund law, MGL Chapter 21E, and the regulations implementing that law, known as the Massachusetts Contingency Plan (MCP).

The proposed revised guidance entails a significant change to the agency's existing guidance document, which affects the scope of site and risk assessments on contaminated properties and the need for or scope of site remediation and/or AULs. If the draft revised guidance is, as MassDEP personnel have suggested, consistent with current DEP practice, then that practice appears to be inconsistent with the agency's current guidance on this critical point.

A quick review of the basic statutory framework is in order. General Laws Chapter 21E, § 3A requires the conduct of response actions at the site of a release of oil and/or hazardous material as necessary to achieve a "permanent solution." That standard requires in turn that there remain, following response actions, "no significant risk" with respect to "current or reasonably foreseeable future uses of the site and the surrounding environment."

It is these current and "reasonably foreseeable" future uses (not all possible future uses) that must be evaluated to determine whether site contamination poses any significant risk(s) that must be addressed by remediation and/or by AULs prohibiting or restricting site uses incompatible with the level of cleanup conducted.

Section 2.3.2 of the department's current AUL guidance document (issued in May 1999) interprets the MCP, correctly in the author's opinion, as "afford[ing] property owners wide latitude in identifying the foreseeable use of their property, considered within the context of the surrounding community." That section of the current guidance explains that one should, "as a starting point," consider "any possible activity or use that could occur in the future," but that the "universe of future uses of a site may be narrowed, usually based upon a specific planned use of the property, a belief that the current use is likely to continue into the future or some other information."

The current guidance proceeds to explain that "[t]he 'reasonably foreseeable use' of a property should be carefully evaluated and may include many activities, although past use and the land use of the surrounding area are usually good indicators of reasonably foreseeable use." In short, the "primary requirement of the regulations is that the reasonably foreseeable use(s) of the property *determined by the owner* and evaluated in the risk characterization must be described in an AUL unless the property will be clean enough for unrestricted use." (Emphasis added.)

The existing guidance includes specific examples of the application of these principles. One such example posits that a former manufacturing facility, now vacant, abuts an industrial area and several homes and that the property owner has no current redevelopment plan. In that case, the guidance indicates, " '[r]easonably foreseeable use' should consider the uses allowed by current zoning or the building's former use in the risk characterization, as well as development consistent with the character of the surrounding neighborhood."

In other words, current zoning and current and historic land use at the site and in the vicinity are all relevant factors in narrowing the universe of potential future uses to those that are reasonably foreseeable.

The proposed revisions to Section 2.3.2 of the guidance delete these provisions limiting the future uses of contaminated property to be considered in the MCP process. As a result, what the current guidance indicates is simply a

See MassDEP, page 8

REBA 2011 SPRING CONFERENCE

THE REAL ESATE BAR ASSOCIATION'S

THE DOUBLETREE HOTEL 5400 COMPUTER DRIVE WESTBOROUGH, MA | MONDAY, MAY 2, 2011 7:30 A.M. – 3:00 P.M.

PLYMOUTH COUNTY TITLE EXAMINER MARILYN DUPUIS TO BE HONORED AT SPRING CONFERENCE

Marilyn Dupuis, who has abstracted real estate titles at the Plymouth County Registry of Deeds for nearly 60 years, will be honored at REBA's 2011 Spring Conference.

Join us at our Spring Conference to honor Ms. Dupuis in her six decades of dedicated service, catch up with old friends, take advantage of accredited continuing education, or to enjoy an informational luncheon with colleagues! We look forward to seeing you in May!

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Complete this registration, include the appropriate fee and return to REBA Foundation, Attn: Annual 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 April 25	After April 25
❒ 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. *Please order by 5/4/11 and 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: ❒ Filet Au Poivre with Crumbled Blue Cheese ❒ Statler Chicken in a Frangelico Cream Sauce

❒ No Lunch ❒ Grilled Salmon in a Creamy Dill Sauce ❒ Smoked Mozzarella Ravioli in a Sambuca Cream Sauce

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.

_____ *Putting the New Homestead Act into Practice* (Bigelow, Delaney, Goldberg)

_____ *Post-Foreclosure Titles in the Post-Ibanez Age* (Graham, Gurvits, Loeb)

_____ *Discerning Fraud in Real Estate Transactions* (Wild, Zappala, DiSantis, McCormick, Ragosta, Galas)

_____ *Understanding Commercial Real Estate Finance in Today's Market* (Bagdasarian, Kaeyer, Mitchell)

_____ *Transfers and Preservation of Distressed Project Entitlements* (Goldstein, Le Ray, O'Donnell)

_____ *The Land Court Today* (Long; Additional Panelists TBA)

_____ *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.

The DoubleTree Hotel
5400 Computer Drive, Westborough

Monday, May 2, 2011
7:30 a.m. – 3:00 p.m.

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- Premium credit for professional liability insurance may be given for attending properly documented continuing legal education programs. For more information contact REBA at (617) 854-7555 or gaudette@reba.net.
- Continuing legal education credit is available in other New England states. Contact REBA at (617) 854-7555 or gaudette@reba.net for specific details.
- Registration to REBA's 2011 Spring Conference is open to members in good standing, their guests and non-members (for an additional fee). Everyone attending the 2011 Spring Conference must register. The registration fee includes the cost of the morning sessions, the seminar written materials and the luncheon. We cannot offer discounts for persons not attending the luncheon portion of the program.
- Please submit only one registration per person. Additional registration forms are available on our website, www.reba.net, or by contacting Andrea Hardy at hardy@reba.net or at 617-854-7555. Confirmation of registration will be sent to all registrants by email. Name badges and a list of registrants will be available at the registration desk located in the foyer of the DoubleTree Hotel.
- Registration with the appropriate fee should be sent via email, mail or fax to arrive prior to April 25, 2011, to guarantee a reservation at the Spring Conference. You are also welcome to register online at www.reba.net. Registrations received after April 25, 2011, will be subject to a late registration processing fee of $25. Registrations cancelled in writing before April 25, 2011, will be honored, but will be charged a processing fee of $25. No other refunds will be permitted. Registrations cancelled on or after April 25, 2011, will not be honored; however, substitutions of registrants attending the program are welcome and may be made at any time. Seminar written materials will be mailed to those who registered but could not attend within four to six weeks after the program.
- The use of cell phones is prohibited in the meeting rooms during the programs and luncheon meeting; however, please be sure to visit the lounge areas. Lounge areas will be located in the Nugget/Wellington Room and the Captain's Room of the DoubleTree Hotel. Refreshments will be served.

SCHEDULE OF EVENTS

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts
SPRING CONFERNECE

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. *Chandler/Edgewood*	***Putting the New Homestead Act into Practice*** Erica P. Bigelow; Lisa J. Delaney; Michael J. Goldberg Finally passed at the end of the legislative session for 2009-2010, REBA's comprehensive Homestead legislation expanded, reformed and modernized homestead law in the Commonwealth. Join REBA's drafting team for a look at the highlights of the new law, "how-to's" for creation, termination, and protection of BFP status by affidavit, and answers to frequently asked questions.
8:30 a.m. – 9:30 a.m. *Baldwin Room* 11:00 a.m. – 12:00 p.m. *Autumn Room*	***Post-Foreclosure Titles in the Post-Ibañez Age*** Eugene Gurvits; Ward P. Graham; Jeffrey B. Loeb The SJC's holding in *U.S. Bank National Association v. Ibañez* has cast a cloud over thousands of titles to properties purchased out of foreclosure, causing innocent homeowners and their counsel to scramble to find solutions to the issues exposed by the *Ibañez* decision. This program will analyze the impacts of *Ibañez*, and will explore various ways in which these issues might be resolved through legislative initiatives and/or further judicial developments (including the potential impact of the *Bevilacqua v. Rodriguez* case currently pending before the SJC). The speakers will further discuss strategies that attorneys for property owners affected by *Ibañez* can employ now to protect their clients' interests.
8:30 a.m. – 9:30 a.m. *Viking Room*	***The Land Court Today*** The Hon. Keith C. Long; Additional Panelists TBA Facilitated by the Hon. Keith C. Long with other judges and court personnel, this session will cover topics relating to the court's new quarters in Pemberton Square and how they affect court practice and procedures. The panel will also discuss the types of cases that have filled the court's docket this past year and offer the court's view on the effective use of experts, chalks and exhibits in various types of Land Court litigation, including registration, boundary disputes, partition actions and appeals from permit granting authorities.
8:30 a.m. – 9:30 a.m. 9:45 a.m. – 10:45 a.m. *Autumn Room*	***Transfers & Preservation of Distressed Project Entitlements*** Marc J. Goldstein; Kathleen M. O'Donnell; Charles N. Le Ray Your client wants to revive a "fully permitted" project that it mothballed many months ago, or is considering purchasing a vacant parcel of land described by the seller as "fully permitted." What are the permits; are they still in effect; are they transferable; what are their terms and conditions; can your client change the use or otherwise revise the project? This panel will explore the challenges and pitfalls in acquiring or re-starting a complex project.
9:45 a.m. – 10:45 a.m. 11:00 a.m. – 12:00 p.m. *Viking Room*	***Discerning Fraud in Real Estate Transactions*** Victor A. Wild; Thomas J. Zappala; Ryan M. DiSantis; Nancy L. McCormick; Ann M. Ragosta; Matthew P. Galas This session will be a unique opportunity to hear from a mortgage fraud team of the U.S. Attorney's Office. Drawing on their experiences in mortgage fraud investigations and prosecutions, including a seven-week jury trial in United States District Court in 2010, the team will discuss the development of large-scale mortgage fraud investigations, schemes used to commit real estate financing fraud, and the trial of *United States vs. Levine, et al*. The panelists will also share insights on how to spot the signs of mortgage fraud.
9:45 a.m. – 10:45 a.m. 11:00 a.m. – 12:00 p.m. *Baldwin Room*	***Understanding Commercial Real Estate Finance in Today's Market*** Bruce H. Bagdasarian; Andrew Kaeyer; Beth H. Mitchell The past several years have seen overwhelming changes in the commer lending environment. These changes have major impact on the pace, scope and terms of real estate acquisitions, refinancings and, particularly, real estate development. Join REBA's panel of lenders' counsel to determine what these changes may mean for your clients and your practice.
12:15 p.m. – 1:15 p.m. *Chandler/Edgewood Room*	***Recent Developments in Massachusetts Case Law*** Philip S. Lapatin Now in his 32nd 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. In 2008 Phil received the Association's highest honor, The Richard B. Johnson Award.
1:30 p.m. – 3:00 p.m.	**LUNCHEON PROGRAM**
1:30 p.m. – 1:50 p.m.	**Recognition of Marilyn Dupuis** John R. Buckley, Jr., Register Plymouth County Registry of Deeds
1:50 p.m. – 2:30 p.m.	**REBA President's Welcome & Remarks** Edward M. Bloom, President
2:30 p.m. – 3:00 p.m.	**REBA Business Meeting** Report of the REBA Title Standards Committee Christopher S. Pitt, Co-chair; Richard M. Serkey, Co-chair
3:00 p.m.	**Adjournment**

MassDEP

CONTINUED FROM PAGE 5

starting point would now become the endpoint, and the statutory term "reasonably foreseeable future uses" would be equated with the phrase "any possible activity or use that could occur in the future."

Applying the department's proposed revised guidance would require that virtually all contaminated property in the Commonwealth be deemed the future site of a residence, with young children playing in the surficial soils. The only exception appears to be property situated in a regulated wetlands, where residential development is prohibited by law.

This significant proposed change in the MassDEP's guidance is worthy of consideration and comment. Moreover, if private parties are already being advised by MassDEP personnel that they must treat contaminated sites as future residential property, knowledgeable legal counsel should evaluate that advice. Depending on the circumstances of a given case, the issue could be significant from the standpoint of cost and/or strategic considerations.

Agency policy that is inconsistent with an enabling statute and/or implementing regulations is, of course, subject to challenge. Thus, adoption by MassDEP of this proposed revision to its AUL guidance will not, should that occur, eliminate the need for legal advice and client decision-making on the issues it presents. In addition to evaluating both the costs of and potential cost savings from pursuing these issues, parties will want to remember that every site with an AUL undergoes a post-closure DEP audit with its attendant risks of enforcement action, loss of liability protections, and additional requirements with respect to response actions and/or AUL amendments.

Jo Ann Kaplan is an environmental lawyer and litigator and serves as the chair of the environmental law group at Boston-based Prince Lobel Glovsky & Tye LLP. She can be contacted at jkaplan@princelobel.com.

AMBROSINI: Condo conundrum

CONTINUED FROM PAGE 1

sued the condominium board and all of the other unit owners, nearly 20 years after the fact, contending that their percentages were too high and that as a result they had overpaid condominium fees for the last 20 years.

The affordable unit owners contended that their percentages (and hence their condominium fees) should have been lower because Section 5(a) of the Massachusetts Condominium Act (G.L. c. 183A) mandates that percentage interests be established according to relative fair values at the time of the creation of the condominium. Section 6(a)(1) of the Massachusetts Condominium Act mandates that condominium fees be assessed according to percentage interest. Hence, the affordable unit owners sought a declaratory judgment reforming the percentages established in the master deed to comply with the statutory mandate and the recovery of hundreds of thousands of dollars in "overpaid condominium fees."

As an interesting side note, after the case was argued on cross-motions for summary judgment, Section 5(a) of the Condominium Act was amended to provide developers with significantly more flexibility in establishing percentage interests in condominiums with affordable units, allowing among other things for percentages to be based on square footage with restricted units. (See Chapter 183 of the Acts of 2010, which became effective on Oct. 24, 2010.)

While the legislation is not per se retroactive, the condominium association filed additional briefs arguing that the Land Court should consider the same retroactive and apply it to the facts of this case under the doctrine of curative retroactivity. Unfortunately, the Land Court refused to address that issue. So the facts and holding of *Ambrosini v. Cawley* are based on the prior iteration of Section 5(a). Until that issue is resolved, condominiums created prior to Oct. 24, 2010, will presumably continue to be governed by the former iteration of Section 5(a), meaning percentages must be based on approximate fair value.

Ambrosini generated a good deal of controversy, and some believe that it was the impetus for the new legislation. The conundrum was created by inconsistent application by developers and their lawyers in setting percentages at condominiums containing affordable units under the former version of Section 5(a). Nearly every condominium project in Boston and surrounding areas built in the last 10 years has had some affordable component. Some developers take the affordability restrictions into account and lower the percentages. Others do not, reasoning that the restrictions are limited in time or are artificial value limitations, or that it is unfair to allow certain unit owners to pay less to maintain the common areas, simply because of an affordability or 40B designation on their units.

Ultimately, in *Ambrosini*, the Land Court, while applying a 20-year statute of limitations to the claims (the unit owners made it in just under the 20-year time period) rejected the affordable unit owners' claims in their entirety primarily on the grounds of equitable estoppel. The Land Court reasoned that the affordable unit owners all knowingly signed a disclosure statement setting forth what their percentage interest was going to be in light of the affordability restriction that was going to expire in 30 years.

The Land Court held that the affordable unit owners received and availed themselves of the benefits of the higher percentage (i.e. voting rights, etc.) during the past 20 years, and were now only trying to shed themselves of the concomitant payment burden after the fact, and ultimately that such a result would be inequitable and unfair to all of the unit owners, especially where the affordability restrictions were set to expire in 2018.

Trombly said, "[they] knew that one of the 'disadvantages' of purchasing their units for far less than the market value was that they would not be able to later sell their units for market value until the price-limitation set out in the deed and covenant expired."

He further explained that the details of the purchase were discussed during negotiations with the BRA and the developer in face-to-face meetings.

"The original owners agreed to be bound by the terms of the master deed and received disclosure statements spelling everything out," he wrote. "It is simply too late for them to back out now… Simply stated, those who purchased their units in 1988 knew the benefits and obligations they were receiving and undertaking. [If the] plaintiffs are successful in this action, they will have accepted the benefits of the bargain while shedding some of the obligations and restrictions which were also part and parcel of the same transaction."

Trombly also ruled that even if the case were not decided on equitable estoppel grounds, that the affordable unit owners had not satisfied their burden of establishing that the respective percentage interests were not based on relative approximate fair value, as they had failed to submit any expert evidence as to the value of the respective units as of the date of the creation of the condominium. Left undecided was what "relative approximate fair value" meant. The affordable unit owners argued that it meant "fair market value," the condominium association argued that "fair value" meant something other than fair market value due to the omission of the word "market" from the statute. For example, the condominium association argued that the term could have meant "fair value" of the services provided to the respective units, which of course make up the condominium expenses and which are not impacted by the existence of affordability restrictions.

However, Trombly also suggested in his decision that the affordability restrictions, especially those limited in duration, are artificial, and do not represent market value. Unfortunately, the absence of expert testimony on the point precluded a determination as to how they should be properly weighed under the prior iteration of Section 5(a).

Ambrosini certainly provides guidance going forward for disputes of this nature. Unfortunately no appeal was taken so we are left without appellate guidance. The obvious lessons learned are that parties should not wait too long before advancing a Section 5(a) reformation claim and that, at a minimum, they need to provide the court with expert testimony to advance such a claim.

Left to be defined by future litigation is exactly what the term "approximate fair value" means: is it fair market value, or something else? Also undecided is what weight, if any, an affordable housing restriction should be given in terms of assessing value and the setting of percentages under Section 5(a). Unfortunately for condominium and real estate litigators, the conundrum seems to have been legislatively resolved for condominiums created after Oct. 24, 2010.

A partner in the Braintree firm of Marcus, Errico, Emmer and Brooks, P.C., Ed Allcock is a member and former chair of the REBA litigation committee. Admitted in Massachusetts, Rhode Island and New Hampshire, he focuses on real estate and condominium litigation. He can be contacted at eallcock@meeb.com.

MBA: Foreclosure Task Force seeks common ground

CONTINUED FROM PAGE 1

The task force's goal is to look at the foreclosure law of Massachusetts in its entirety. Over the years, piecemeal revisions to the foreclosure law have lead to inconsistencies and confusion as to what is required to foreclose in Massachusetts. This confusion has been reflected in recent court decisions, including the Supreme Judicial Court's decision in *U.S. Bank National Association, trustee, vs. Antonio Ibañez* and the Bankruptcy Court's decision in *In re Sima Schwartz*. Some of the provisions of the foreclosure laws date back to 1912, and do not reflect changes in the ways people communicate or utilize the many new technological advances.

The members of the task force agree that it is in the best interests of the borrowers and lenders to try to keep borrowers in their homes, and this is one of the important goals of any legislation which may come out of the task force. Some of the most common issues raised by both borrowers and lenders are the lack of communication between the parties, the lack of response by each side to repeated requests for information, participation by qualified decision makers for the lenders, and knowledgeable representation for the borrowers to assist them in understanding their rights and obligations.

One of the proposals being considered by the task force is the establishment of a mediation procedure that would create a forum for lenders and borrowers to communicate with each other, analyze the status of the borrower, the property and the loan, and attempt to find a means to avoid a foreclosure, whether by modifying the loan, allowing for a short sale, a deed in lieu of foreclosure, or any other alternatives acceptable to both sides. In response to the mortgage foreclosure crisis, many states and municipalities around the country have already adopted mediation programs which vary greatly in their terms. Currently, every state in New England – except for Massachusetts – has a mediation program in place.

From left, members of the task force at work: Lee J. Gartenberg, director of inmate legal services for the Middlesex County Sheriff's Department; Esther Schlorholtz, director of community investment and senior vice president of Boston Private Bank & Trust Company; Kathleen C. Engel, associate dean for intellectual life and professor of law at Suffolk University Law School; and Robert T. Cannon, adjunct professor of the Isenberg School of Business at the University of Massachusetts.

Bills that involve foreclosure have been filed in the current session of the legislature, including: the bill filed by Secretary of State William Galvin seeking judicial review of foreclosure; a bill filed by Massachusetts Alliance Against Predatory Lending seeking mandatory mediation with a judicial oversight component; and Boston Mayor Thomas Menino's proposal to adopt a mediation program in Boston similar to one being used in Rhode Island.

Members of the task force are in the process of drafting proposals for a mediation program and a complete overhaul of the mortgage and foreclosure statutory scheme in Massachusetts. The variety of expertise, information and opinions which comes to each meeting of the task force provides excellent fuel for the discussions of all proposals and an education on all of the different aspects of foreclosure. The aim of the task force is to produce a legislative proposal that has the support of all of its members, takes into account modern methods of notice, improves communication between the parties, and provides affordable oversight by the executive branch of the Massachusetts government.

In conjunction with the work of the task force, the Massachusetts Bar Association is offering a series of seminars on topics related to foreclosure for which the MBA is waiving the admissions fee for any attorney who commits to representing at least one distressed borrower pro bono. The MBA's first such seminar, held in October, provided an overview of the recent changes to Massachusetts General Laws Chapter 244.

In future seminars, the Committee for Education for Attorneys Representing Individuals Facing Foreclosure hopes to cover topics including HAMP loan modifications and other alternatives to foreclosure, Chapter 93A, the impact of the ruling in *Commonwealth v. Fremont Investment & Loan* on foreclosures in Massachusetts, and borrower remedies under RESPA and the Truth-in-Lending Act.

Laurel Siegel is the principal of the Law Offices of Laurel H. Siegel, LLC, and co-chair of the Joint Foreclosure Legislation Task Force. She can be reached at laurel@lsiegallaw.com. Elizabeth Barton is title counsel for CATIC's Wellesley, Mass. office. She can be reached at bbarton@CATICACCESS.com.

GUEST COLUMN

Our primitive condominium statute

BY SAUL J. FELDMAN

For at least four decades, I have formed condominiums under MGL Chapter 183A, the Massachusetts Condominium Statute. Chapter 183A is a first-generation statute adopted in 1963. Our courts have stated that matters not specifically prohibited in Chapter 183A are allowed, as Chapter 183A is merely an enabling statute. This concept has allowed flexibility and creativity. It has allowed me to push the envelope in being able to give my developer and converter clients the condominium regimes that they wanted. For example, the condominium form of ownership was very useful when it was not possible to subdivide a large parcel of land, such as in the case of Weymouthport condominium in Weymouth and Black Rock condominium in Hingham. Condominiums have included various permutations of phased condominiums and mixed use condominiums. Urban condominiums were often used as a vehicle to combat rent control. Suburban, and some urban, condominiums were developed to allow higher density and affordable housing.


Saul Feldman

However, recently I have worked with a second-generation statute, adopted in another state, which is based upon the Uniform Condominium Act. After much thought, I have come to the conclusion that it would be best for Massachusetts condominium law and practice if Massachusetts adopted the Uniform Condominium Act in place of Chapter 183A.

In this article, I will attempt to explain my reasons for coming to the conclusion that now is the time to make a major change to condominium law in Massachusetts.

RECENT AMENDMENTS

Our condominium statute has been amended many times since its enactment in 1963. Most recently in 2010, Chapter 183A was amended to recognize that the percentage interests in the common areas and facilities of each of the affordable units in a condominium may reflect the reduced value of the affordable units as long as the units remain affordable. This change was long overdue. It merely codifies what a majority of attorneys who draft condominium documents have been doing all along. Units that were subject to affordable housing restrictions should have lower percentage interests than market rate units, which were similar to the affordable units. Even though the amendment states the obvious, I believe it was wise to clarify the statute on this point. The affordable units have lower percentage interests than market units and therefore smaller condominium fees and less voting power.

While this change is good, I am not pleased with the other change the recent amendment made. The other change allows the use of square footage to determine the manner in which common expenses are allocated. This misses the point. The amendment should have stated that square footage is an *allowable* method of computing percentage interests. Most people believe that this is what the statute, as it is, provides anyway. The amendment means that percentages must continue to be based on value, but square footage may now be used for the assessment of common expenses. Accordingly, condominium fees could be determined by square footage, but voting and allocation of common element interests would continue to be determined by value. This is an unnecessary complication.

THE UNIFORM CONDOMINIUM ACT

The foregoing brings me to the main point of this article. Rather than continuing the practice of amending the statute every few years to correct a problem, it would be better for Massachusetts to adopt the Uniform Condominium Act in place of Chapter 183A. The Uniform Condominium Act was approved by the National Conference of Commissioners on Uniform State Laws in 1977. It was amended in 1980. The Uniform Condominium Act has been adopted by a majority of the states. Chapter 183A is a primitive, first-generation statute. Adoption of the Uniform Condominium Act would bring Massachusetts condominium law and practice into the 21st century.

For example, regarding allocation of common element interests, voting and common expenses, the Uniform Condominium Act allows allocations which are unrelated to value. This type of flexibility should be emphasized. The chief argument for keeping Chapter 183A has always been that it allows for flexibility. However, under Chapter 183A, flexibility causes problems. State courts have stated that Chapter 183A is merely an enabling statute and therefore matters not prohibited by Chapter 183A are allowed (see *Tosney v. Chelmsford Village Condominium Association*, 1986). Matters prohibited by Chapter 183A, however, are normally cast in stone. Until recently, I had always believed that the proportionality requirements of Section 5(a) of Chapter 183A were. However, a recent case put this limitation on flexibility in doubt. In *Scully v. Tillery*, 2010, the court found to be enforceable a settlement agreement whereby the percentage allocations which I had always thought were required by Chapter 183A were waived.

The Uniform Condominium Act was introduced in the Massachusetts legislature in 1980. Had it become the law then, we would have been spared the numerous amendments of Chapter 183A and the numerous judicial decisions, some good and some very bad. It is beyond the scope of this article, but it would be interesting to list all of the problems which would have avoided in the past 30 years had the Uniform Condominium Act been enacted in 1980.

A SPECIFIC EXAMPLE

A specific example is helpful. I have recently drafted documents to relocate a room in a condominium unit to make it part of the adjacent unit. While there is no process for this in Chapter 183A, there are specific provisions for this sort of situation in the Uniform Condominium Act.

More generally, over the years I have been asked by developers and associations to provide unusual features in the condominium documents. In every case, it would have been helpful to be able to rely on a specific section of our condominium statute. This would have been possible under a second-generation statute such as the Uniform Condominium Act, but not under our primitive first-generation statute.

CONCLUSION

I argue that the adoption of the Uniform Condominium Act in Massachusetts would be better for condominium law and practice. Chapter 183A will continue to require amendments and judicial clarifications. Adopting the Uniform Condominium Act would be better than continual amendments of Chapter 183A and litigation when specific problems arise.

The Uniform Condominium Act is very comprehensive. It balances developer interests and the protection of consumers. It covers leasehold condominiums, phased condominiums, limited common elements, exercise of development rights, rights of secured lenders, protection of buyers, operating the association, management and master associations.

When Chapter 183A was enacted in 1963, it was geared toward simple apartment buildings. Over the years, the condominium form of ownership has expanded to townhouses, free-standing homes, office buildings, warehouses, mixed-use buildings, vacation homes and retail buildings. A statute that may have worked in 1970 or 1980 does not work in 2011.

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A plague on all your houses

BY RICHARD M. SERKEY

In the wake of the SJC's *Ibañez* decision,it may be instructive to consider the relative culpability of the respective participants, none of whom intended to create havoc, but all of whom, it must be acknowledged, profited from the process that brought us where we are now:


Rich Serkey

- Lenders, who made adjustable rate loans to borrowers who would later prove unable to make their payments after their interest rates started adjusting;
- Loan originators, whose commissions were higher if they could induce borrowers to select riskier loan programs;
- Secondary mortgage market investors, who provided the "demand," while lenders provided the "supply;" and
- Borrowers, who naively believed that real estate values would rise forever

The following sorry scene has now unfolded:

- Borrowers foreclosed upon and evicted, after their loan payments skyrocketed as their home values plummeted;
- Lenders unable to foreclose mortgages in default due to sloppy documentation of post-closing mortgage assignments; and
- Good faith purchasers for value (and their lenders) of properties whose titles derive from foreclosure deeds (often several owners back in the chain of title), who now find themselves with unmarketable titles (and unmarketable mortgages).

And who is it who must sort through this detritus and adjudicate these claims? Judges, of course – and the judges have thrown a judicial tantrum: On the one hand, torn between longstanding precedent requiring a party to have standing in order to raise a claim, and, on the other, a reluctance to exercise judicial discretion in favor of the powerful against the weak, judges have rendered decisions that collectively amount to "a plague on all your houses."

Why? The unarticulated reason, is manifest: An understandable revulsion at a marketplace that lined its own pockets at the expense of the consumer. If the foreclosure process were compared to baseball's double play, we might say that umpires are now, all of a sudden, refusing to tolerate the "phantom tag" put on the runner by the shortstop or second baseman. In baseball, this would cause an uproar. In real estate, an equally radical change ought to be causing an equal uproar, but it isn't, because you can't argue with a judge the way you can argue with an umpire. Judicial decisions are now upending what was previously thought to be settled law, because judges feel they are the borrowers' last defenders against a marketplace turned jungle. Their motivation is salutary, but has the law itself joined the casualty list?

A partner in the Plymouth County firm of Winokur, Serkey & Rosenberg, P.C., Rich Serkey is co-chair of REBA's title standards committee and serves on the board of directors. He can be contacted at rserkey@wwsr.com.

COMMENTARY

You can't always get what you want

BY PAUL F. ALPHEN

In January the *The Boston Globe* reported a proposal to bring "discount retailer Ocean State Job Lot to a vacant building … on a rundown block on Somerville's Winter Hill." The report asserts that the mayor was strongly opposed to bringing a "dollar store" to "his" town.

Paul Alphen

An article followed four days later about neighborhood opposition to a Whole Foods store replacing the discount Hi-Lo Foods store in Jamaica Plain, with fears that many local residents could not afford Whole Foods' higher prices. . In the *Boston Herald*, a columnist criticized the mayor of Boston for opposing a proposal for a Walmart.

I thoroughly enjoyed the articles (and some of the many online comments) and pondered the sociology surrounding the issues. You can't please everybody.

In my role as a practicing real estate development attorney representing local, regional and national development clients before land-use boards primarily in Middlesex County, I often encounter critics the suburbs we are constantly bombarded with opposition to anything and everything. In one town that is ultrasensitive about losing its charm and character, my colleagues and I are constantly criticized for not bringing "appropriate" stores to town. Apparently there are bragging rights associated with the brand of stores located within your town. I used to think people cared about the quality of their schools, not the quality of their shoe stores.

Some folks fail to appreciate the complexities of the research, analysis and decision-making processes retailers must complete before committing substantial sums to open a new store. While standing before a board with a proposal, board members and residents will fearlessly complain about the proposed tenant and ask "Why can't we get a Whole Foods?" (or a Trader Joe's or a Panera Bread, etc). Meanwhile, the local residents jam the aisles of the local DeMoulas.

In the neighboring town a local developer proposed a new body shop, a permitted use, flanked by a car dealership and a service station, and the board and the residents protested, saying, "Why does the town next door get all the restaurants and we get the body shops?" The applicant eventually withdrew.

Gov. Deval Patrick and the courts deliver speeches about the need for economic growth in the Commonwealth, but in reality, the economic engine is operated by a handful of individuals in 351 cities and towns. Often, they are not the elected or appointed board members; decisions are driven by a small group of residents who appear before boards in opposition to a proposal. Recently, three individuals railed against signs proposed to be placed on a new car dealership. Over the course of two months, before two boards, at six different meetings, the dealer finally got permission to place signs on the building. At one point local counsel interrupted the debate and said: "You've got to admit that it is fascinating that we have a process that grants to a handful of people the right to decide if a retailer has the right to have a sign on his building."

> It seems odd that a few individuals can decide that a Jaguar dealership is appropriate, but will attempt to block a Chevy dealership.

Commerce is a form of democracy, and people vote with their feet. If a community does not support a local store, the store will close. However, too often a small group of self-appointed "concerned citizens" attempt to keep out businesses that they do not approve of, without ever providing the residents with the opportunity to shop at the store and determine if they will support the continued success of the store. Zoning by-laws are supposed to determine if gas stations, hardware stores or car dealerships are permitted in a certain part of town; it seems odd that a few individuals can decide that a Jaguar dealership is appropriate, but will attempt to block a Chevy dealership.

Anonymous online forums and newspaper blogs fan the flames further. Letters to the editor still require a name, address and signature. However, newspapers and private parties sponsor anonymous blogs that allow defamatory comments without accountability.

We have all seen inaccurate and mean-spirited published blog aimed at individuals or companies. It's an adult version of bullying. We know that many officials see the blogs and it is hard to believe that the rants do not influence their decisions.

The economy of the Commonwealth is directly affected by its reputation as a difficult place to do business, and things will not improve unless there can be predictability and accountability in the permitting process.

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.

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