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MERSCORP CEO sets the record straight

BY BILL BECKMANN

There are many misconceptions about MERSCORP, Inc. and its subsidiary, Mortgage Electronic Registration Systems, Inc. (MERS), which are being used to support adverse litigation and potential legislation in Massachusetts. This article is intended to dispel some of these myths.

The sole purpose of MERS is to be the mortgagee of record, as the nominee for the beneficial owner of the mortgage loan. This basic concept underlying our business model is based on the well-established legal principal that an agent can hold title to the mortgage lien on behalf of the owner of the indebtedness. Our innovation is that MERS acts as the common agent, holding title for all of the member lenders, servicers and investors using MERS. The legality of the MERS process in Massachusetts has been established in a long line of cases, most recently in the *Culhane* and *Peterson* cases in the U.S. District Court for Massachusetts; another case in the same court, *Kiah*, was recently affirmed by the U.S. Court of Appeals for the First Circuit.

MERSCORP operates and maintains an electronic registration system (the MERS system) that tracks changes in the servicing rights for, and beneficial ownership of, the mortgage loan. All mortgages registered on the MERS system are recorded in public land records and all of the recording fees are paid.

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HERBERT W. VAUGHAN

Leading lawyer, preservationist, philanthropist

Herbert W. Vaughan, a pioneering real estate lawyer who helped to shape the skyline of Boston and preserve hundreds of acres of conservation land throughout Massachusetts, died Nov. 21, 2011 at his home in Fox Hill Village, Westwood, Mass. He was 91 years old.

Born in Brookline in 1920, Vaughan, known to his colleagues and friends as "Wiley," received his undergraduate degree in philosophy from Harvard College in 1941. Following graduation from Harvard Law School in 1948, he joined the Boston law firm of Hale and Dorr, now known as Wilmer-Hale. During his 47-year career at Hale and Dorr, Vaughan developed a reputation as a dean of the Boston real estate bar, while helping to oversee the growth of the firm into one of the nation's strongest and most successful.

See VAUGHAN, page 3

FROM THE PRESIDENT'S DESK

Hard winter before the gentle spring

NREIS case continues

BY CHRISTOPHER S. PITT

As I write this the week before the start of the new year and the start of my year as REBA's president, the unusually balmy temperatures outside feel like spring in New England. But we Bay Staters know that before the spring will inevitably come a cold and sometimes uncomfortable winter. No way around it. Today, REBA still feels the warmth of its favorable decision of last spring from the SJC in the *NREIS* case, a major step forward in our fight against the unauthorized practice of law in Massachusetts. But just as a blustery winter is sure to be around the corner, here at REBA we look ahead to what is likely to be a turbulent and challenging year.

Chris Pitt

The foreclosure crisis presents a series of challenges for REBA. After a long run-up, the foreclosure-related bills working their way through the legislature are focused primarily on the ongoing relations between lenders and delinquent borrowers, finding ways to prevent consumers from losing their homes while increasing the level of fairness in the mortgage process. REBA has no vested interest in a particular legislative outcome, except to ensure that any new legislation result in a system that works. REBA's experienced Legislation Committee and our Legislative Counsel Ed Smith monitor all pending bills to insure that REBA's voice is heard.

However, the current legislative focus on some form of borrower/lender mediation and the Attorney General's well-publicized lawsuit looking to tag the largest lenders with blame for some portion of the mess both overlook a potentially crippling title crisis. This problem has resulted from a decade of inattention in the mortgage industry to the level of detail that has been the hallmark of

See PITT, page 6

The aftermath of *Ibanez* and *Bevilacqua*

Potential remedies for property owners

BY JEFFREY B. LOEB AND DAVID GLOD

Francis J. Bevilacqua thought he had purchased a piece of real estate from U.S. Bank in October of 2006. There was a foreclosure deed of record conveying the property to U.S. Bank, and U.S. Bank executed a quitclaim deed to Bevilacqua. The foreclosure had been conducted in accordance with applicable conveyancing standards at the time (including REBA Title Standard 58) and the closing attorney had certified title to Bevilacqua.

Four years later, it turned out that Bevilacqua did not own the property, because the Supreme Judicial Court's ruling in *U.S. Bank v. Ibanez* (Jan. 7, 2011) indicated that the foreclosure had been void. *Ibanez* held that, in order to validly foreclose, the foreclosing entity had to be the holder of the mortgage at the time it published notice of the foreclosure. In Bevilacqua's case, the recorded assignment of the mortgage to the foreclosing entity had not been executed until after notice had been published and the foreclosure completed.

While the *Ibanez* matter was pending at the SJC, Bevilacqua filed an action in the Land Court that would have compelled the foreclosed-upon prior owner to assert his claim to the property or else lose it. But the Land Court held,

See NEXT STEPS, page 8

Free speech decision creates an unsettling precedent for community associations

BY THOMAS O. MORIARTY

"You can't always get what you want" applies to court decisions, as it does to most things in life. It is also true that you don't always get what you expect.

That was the case in a recent Massachusetts Appeals Court decision holding that a community association's rules must respect an owner's constitutional right to freedom of speech.

Tom Moriarty

To understand why this decision, *Board of Managers of Old Colony Village Condominium v. Steven Preu*, 80 Mass. App. Ct. 728 (2011), was both unexpected and distressing, remember that the First Amendment says, "Congress shall make no law" abridging the freedom of speech. The courts have consistently interpreted this to mean that governmental entities – federal, state and local – must respect the free speech rights of citizens. Courts that have considered the issue have also generally agreed that community associations are not governmental entities, and so are not required to provide constitutional protections to residents.

The New Jersey Supreme Court made that point clearly and emphatically in a 2007 decision *Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association*, ruling that "the nature, purpose, and primary use of Twin Rivers' property is for private purposes and does not favor a finding that the association's rules and regulations violated plaintiffs' constitutional rights."

A STATE ACTION

Unlike the New Jersey court, the Massachusetts Appeals Court did not consider whether the community association was a governmental entity; it focused instead on whether the trial court's enforcement of the board's rights under G.L. c. 183A itself constituted state action triggering constitutional protections. And the court concluded that the trial court's enforcement action (and, therefore, the board's action in filing suit to enforce the association's rights under the Massachusetts condominium statute) did, in fact, constitute state action sufficient to trigger the application of constitutional standards.

The case involved a long-running dispute between the association's board and an owner (Preu), who expressed his dissatisfaction with board decisions by, among other actions, depositing bags filled with dog feces in common areas, wedging open or obstructing fire doors and posting offensive signs in common areas, all of which, the board contended, violated association rules governing the use of common areas and constituted "misconduct" under the Massachusetts condominium law.

A Superior Court judge agreed that some of Preu's actions (placing feces in common areas and tampering with fire doors) violated the association's rules and regulations, the state condominium statute, or both. But the court held that "communication by signs and posters is pure speech," protected by the First Amendment, which the association could not restrict. The association appealed on that point – and lost.

The Appeals Court ruled that constitutional protections applied not because the community association was a governmental entity, but because resorting to the court to enforce a state law, (the Massachusetts condominium statute) was sufficient to constitute "state action," requiring association rules to pass constitutional muster.

A DRAMATIC DEPARTURE

Although the decision was surprising, it was not entirely unheralded. In dicta in previous decisions, Massachusetts courts have hinted that constitutional protections might apply in common interest ownership settings. One appellate case in particular, *Noble v. Murphy*, 34 Mass. App. Ct. 452 (1993), held that an association's rules might be insulated from attack except "on constitutional or public policy grounds." However, the Noble court did not hold, as the Appeals Court here suggests, that a condominium association's regulations are subject to invalidation "if they violate a right guaranteed by 'any fundamental public policy or constitutional provision.'"

See MORIARTY, page 9

Anticipating the SJC *Eaton* decision in light of *Culhane* and *McKenna*

BY JOEL A. STEIN

Conveyancers anxiously awaiting the decision of the Supreme Judicial Court in the case of *Eaton v. Federal National Mortgage Association* were treated to two decisions published between Thanksgiving and Christmas which consider the same question raised in *Eaton* – whether the mortgagee must also be the note holder in order to effectively foreclose.

The first of these two cases, *Culhane v. Aurora Loan Services of Nebraska*, No. 11-11098-WGY (D. Mass) was decided in the United States District Court. The opinion, written by Judge William Young, endorsed the superior court's decision in *Eaton*. However, Young's opinion is notable for its elaborate and exhaustive discussion of Mortgage Electronic Registration Systems (MERS) and acknowledgement of how effectively MERS works in Massachusetts.

The second case, *Wells Fargo Bank, N.A. v. Suzette McKenna*, Land Court 11 MISC 447455, was decided in the Land Court. Judge Gordon Piper, finding fault with the Trial Court's decision in *Eaton*, finds that Massachusetts statutory and case law support the argument that a mortgagee need not be the note holder in order to foreclose.

EATON VERSUS *CULHANE*

The facts in the *Eaton* case are straightforward. In 2007, Henrietta Eaton mortgaged her property in Roslindale to MERS, as nominee for BankUnited, and signed a promissory note to BankUnited. In 2009, the mortgage was assigned by MERS to Green Tree Servicing LLC, which foreclosed the mortgage and assigned its bid to Federal National Mortgage Association, Inc. When FNMA sought to evict Eaton from the premises, she filed a complaint in Suffolk Superior Court seeking a declaratory judgment that Green Tree did not conduct a valid foreclosure, because it was not the holder of the note at the time of foreclosure.

Joel Stein

The Superior Court granted Eaton's motion, holding that, in Massachusetts, the mortgage and the note could travel independently, but must be "co-united to effectively foreclose the mortgagor's right to redeem the property." Green Tree had stipulated that it did not hold the note at the time of the foreclosure, and the court held that Eaton was likely to prevail on her claim that it had conducted an invalid foreclosure.

In the *Culhane* case, Oratai Culhane refinanced her property in Milton in 2006, executing a promissory note to Preferred Financial Group Inc., doing business as Preferred Mortgage Services, and a mortgage to MERS. In 2009, the mortgage was assigned from MERS, as nominee for Preferred, to Aurora Loan Services LLC. Aurora scheduled a foreclosure sale for May 16, 2011. Culhane sought a temporary restraining order, and Aurora filed for summary judgment.

Unlike the *Eaton* case, where no evidence was offered as to the ownership of the note, an undated endorsement on back of the original note showed Deutsche Bank National Trust Americas, as Trustee for Residential Accredit Loans Inc., Mortgage Asset-Backed Through Certificates 2006, to be the current note holder.

Young reviews in great detail the current state of Massachusetts foreclosure law, including the statutory power of sale, unity of the note and mortgage, MERS and the standard MERS mortgage contract. In *Culhane*, having been shown evidence that the holder of the mortgage was also servicing the loan on behalf of the note holder, Young writes, "unless the Supreme Judicial Court decides otherwise in *Eaton* … this court, in agreement with two justices of the Massachusetts Superior Court …. reads the law as requiring a mortgagee to possess the legal title to the mortgage and either hold the note or establish that it is servicing the loan on behalf of the note holder."

MERS IN MASSACHUSETTS

Of greater importance is Young's discussion of MERS.

Culhane's mortgage instrument is the standard MERS mortgage contract.

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VAUGHAN: Remembering a legendary lawyer

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When he was admitted to the bar, the Custom House Tower stood as the tallest building in Boston. Over the next few decades, a building boom radically transformed the skyline of the city. During that time, Vaughan was the go-to lawyer for developers and lenders involved in Boston's most complex and prominent projects because of his reputation for wisdom and judgment, meticulous drafting, tenacious negotiating and consummate deal-making skills.

His involvement began when he served as co-counsel on the pivotal Prudential Center, which converted a blighted rail yard into a vibrant and catalytic commercial center. In order to make that project financeable, Vaughan worked tirelessly with the state Legislature to obtain milestone legislation to protect lenders and investors from the unpredictability of local real estate taxation.

In addition to managing a thriving practice, Vaughan chaired Hale and Dorr's Real Estate Department and Executive Committee, and he served as co-managing partner for the firm from 1976 to 1980. When Vaughan joined Hale and Dorr in 1948, there were 32 lawyers in the firm's sole office in the 10-story building at 60 State St. He spent his first year sharing an office, seated opposite the desk of his mentor, Roger Swaim.

Today, WilmerHale has over 1,100 lawyers with offices in Boston, Washington, New York, California and abroad. While much of the firm's growth occurred after his retirement, Vaughan's leadership during his tenure helped to set the stage for the firm's success.

William F. Lee, who was a law partner of Vaughan's and is co-managing partner of Wilmer Hale, remarked that "Wiley was a consummate lawyer, a wise counselor and a great leader. He mentored and developed several generations of outstanding real estate lawyers and always ensured that our lawyers represented the best the profession had to offer. At the firm, he was our partner and our colleague, but most of all, our friend."

Following his retirement from Hale and Dorr in 1995, Vaughan continued to consult for clients of the firm for many years, including in the areas of tidelands, wetlands and complex title matters, in which he was a nationally-recognized expert.

Vaughan made lasting contributions to the practice of real estate law in Massachusetts. Along with a handful of members of The Abstract Club, an association of distinguished real estate attorneys of which he was secretary and treasurer from 1971 to 1977 and president from 1977 to 1980, Vaughan led the effort to enact legislation in the 1970s that reformed many archaic and inefficient rules and standards that had plagued real estate titles.

He was also a contributing author and editor of *Crocker's Notes on Common Forms*, known to real estate practitioners as the "conveyancer's bible." He frequently lectured and served as a panelist for programs sponsored by Massachusetts Continuing Legal Education – for which he established a scholarship fund – and other legal and industry trade organizations. Vaughan was president of the Massachusetts Conveyancers Association, the predecessor to the Real Estate Bar Association for Massachusetts, from 1963 to 1964. In 1989, he received the association's highest honor, the Richard B. Johnson Award.

Herbert Vaughan, during his presidency of the Massachusetts Conveyancers Association (1963-1964). The Massachusetts Conveyancers Association was the predecessor of the Real Estate Bar Association.

He also held leadership positions within the real estate section of the Boston Bar Association, where he led the successful effort to found the "Lawyer for a Day" program, which for more than a decade has assisted almost 14,000 tenants and lower-income landlords to resolve residential disputes in the Boston Housing Court.

Vaughan was regarded by his peers as one of the leading real estate lawyers in the United States. He was an active member of prestigious and important national real estate law organizations, including the American College of Real Estate Lawyers, in which he was a charter member, and the American Law Institute, which was formed to improve the law and its administration.

An avid conservationist, Vaughan had a deep love and respect for land and was committed to preservation of our natural environment. He was a life trustee and past chairman of The Trustees of Reservations, which owns fee title to more than 25,000 acres of protected land at more than 100 reservations and holds conservation restrictions on more than 345 other properties in Massachusetts.

In 2004, the trustees awarded him The Charles Eliot Award for his leadership, service and devotion to conservation. Commenting on Vaughan's 31-year association with the organization, Andrew Kendall, president of The Trustees, noted that "one of Wiley's great commitments was to expand and improve the educational programming available to The Trustees' audience. His efforts on this point were transformational to the caliber of the educational experiences and opportunities now offered at The Trustees."

Vaughan was also a passionate scholar of government and history, particularly the United States Constitution, which he regarded as the "greatest practical achievement of political science." He was a member of the board of directors of the Witherspoon Institute, a private, independent think tank in Princeton, New Jersey, that supports the work of scholars interested in western moral political thought and the principles and institutions of American government. A fellow of the Massachusetts Historical Society and a member of the James Madison Program in American Ideals and Institutions at Princeton University, Vaughan endowed lecture series at Princeton and at his alma mater, Harvard Law School, to advance the understanding of the core doctrines of American constitutionalism. The lecture series have featured prominent scholars, including Supreme Court Justice Antonin Scalia, who delivered the inaugural lecture of the Vaughan series at Harvard Law School.

Upon learning of his passing, Professor Martha Minow, dean of Harvard Law School, commented that "Wiley Vaughan's devotion to the fundamental principles of our legal system is outstripped only by his own example as a superb lawyer, leader and man of fine judgment. All lucky enough to be associated with him – through his great firm, his law school and other communities – now have the tall order of carrying on his high standards of excellence and integrity."

Vaughan was a trustee emeritus of the board of trustees of the American Friends of New College, Oxford University, where he spent a term as a visiting senior fellow in 1985, exploring the writings of leading philosophers of law. Oxford University honored him with the Edmund Burke Award for lifetime service and achievement.

Vaughan was also a member of the Society of Fellows and the Alumni Leadership Council of the American Council of Trustees and Alumni.

In his later years, Vaughan grew concerned about the bleak outlook for the field of primary care physicians, whom he considered to be vital to the health care system, but sorely overworked and undervalued. To support his goal of furthering the practice of primary care, he established a fund at Brigham and Women's Hospital in honor of his long-time physician, Dr. Thomas H. Lee. The fund provides an annual award to a Brigham and Women's physician who provides exceptional service and compassionate care. A companion fund helps to bring a distinguished physician to the Hospital annually to discuss issues arising in the area of primary care.

Among his final acts, Vaughan was moved to create a fund at Harvard Law School that will honor Lee's brother, William F. Lee of WilmerHale. The gift to Harvard is expected to support the development of leadership in the legal profession.

Vaughan's wife of over 50 years, Ann (Graustein), an artist and sculptress, died in 2002. Among other pursuits, they shared a love for dogs, especially West Highland Terriers. They also greatly enjoyed boating. Ann Vaughan, a fishing enthusiast, would often take a rod and reel with them on their regular Saturday excursions on the water.

A memorial service for Vaughan at St. Andrew's Episcopal Church in Wellesley is planned in January 2012.

By Sean T. Boulger, with assistance from Andrew T. Cohn and John D. Hamilton Jr., all of Wilmer Hale.

Are unearned fees allowed if they are not shared?

BY DOUGLAS W. SALVESEN AND NOEMI A. KAWAMOTO

The Real Estate Settlement Procedures Act of 1974 (RESPA) prohibits a settlement service provider from splitting an unearned fee with another party. But can the service provider legally keep the entire unearned fee for itself?

This curious question is presented by *Freeman v. Quicken Loans*, a case that will be argued to the Supreme Court in February. The court's answer will both determine the scope of RESPA and the power of federal agencies to interpret sometimes enigmatic statutes.

ALLEGATIONS OF "UNEARNED FEES" UNDER SECTION 8(B)

In 2007, several actions were filed by homeowners against their mortgage lender, Quicken Loans. The homeowners claimed that Quicken Loans had charged them fees for non-existent services. For instance, they alleged that Quicken Loans charged them "loan-discount fees" but did not provide any "discount" to their loans, such as a reduced interest rate. The homeowners asserted that such fees were "unearned" and illegal under Section 8(b) of RESPA, which states: "No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed."

Quicken Loans denied that the fees were unearned and asserted that, in fact, the homeowners had received a lower interest rate on their loans. Quicken Loans also attacked the legal basis of the claim, arguing that there could be no violation of Section 8(b) because the challenged fee was not split with any other entity.


Doug Salvesen


Noemi Kawamoto

The federal agency responsible for interpreting and enforcing RESPA, the Department of Housing and Urban Development (HUD), had issued policy statements that were contrary to the position staked out by Quicken Loans. Those policy statements concluded that an unearned fee could violate Section 8(b) even if only a single entity was involved. HUD warned that "Section 8(b) forbids the paying or accepting of any portion or percentage of a settlement service – including up to 100 percent – that is unearned, whether the entire charge is divided or split among more than one person or entity." It reasoned that the proscription in Section 8(b) against "any portion, split, or percentage" of an unearned charge for settlement services was written in the disjunctive and, therefore, the prohibition was not limited to a split.

FIFTH CIRCUIT DISMISSED RESPA CLAIMS AGAINST QUICKEN LOANS

Notwithstanding HUD's policy statements, Quicken Loans prevailed in District Court and before the Fifth Circuit Court of Appeals. Both courts held that Section 8(b) was restricted to kickbacks or unearned fees that had been divided between two or more parties.

To reach that result, the Fifth Circuit put Section 8(b) under a grammatical microscope, a task ordinarily entrusted to regulatory agencies. First, the Fifth Circuit examined the phrase "[n]o person shall give and no person shall accept." The court concluded that the use of the conjunctive "and" implied that the provision required two parties each committing an act, one giving and one accepting payment.

The Fifth Circuit found further support for this conclusion in Section 8(a) which used similar language while expressly prohibiting "kickbacks." The court stated that to be consistent with Section 8(a), subsection (b) "should require two culpable actors as well."

Next, the Fifth Circuit looked at the words "portion, split, or percentage," and found that "all three words require less than 100 percent or the whole of something." The court acknowledged HUD's interpretation, that certain statutes use "any portion" and "any percentage" to include situations that involve the entirety of something." But, invoking the canon of *noscitur a sociis* ("a word is known by the company it keeps" – which sounds like more like motherly advice than a canon of statutory interpretation), the Fifth Circuit reasoned that Congress intended a narrower interpretation of "percentage" and "portion" in Section 8(b) because it also included the word "split," which "requires dividing a single thing among several parties."

Finally, the Fifth Circuit noted that RESPA's stated purpose was to prohibit kickbacks and referral fees and that it was not intended to be a general prohibition on overcharges or unearned fees. The court rejected the homeowners' argument that it should defer to HUD's contrary interpretation of the statute, in part, because HUD's policy statement "was not promulgated through

See RESPA, page 7

Foreclosures and untimely assignments

BY RICHARD P. HOWE JR.

In his concurring opinion in *U.S. Bank v. Ibanez*, Supreme Judicial Court Associate Justice Robert Cordy observed that what was most surprising about the case was "the utter carelessness with which the plaintiff banks document the titles to their assets" and emphasized that before commencing a foreclosure, "the holder of an assigned mortgage needs to take care to ensure that his legal paperwork is in order." Mindful of Cordy's admonition and because of the comprehensive lawsuit recently filed by Attorney General Martha Coakley, which alleges among other things that five defendant national lenders routinely conducted foreclosures prior to receiving valid assignments of the underlying mortgages, I decided to scrutinize the records here at the Middlesex North Registry of Deeds to gauge the scale of this problem.


Dick Howe

The question I sought to answer was how many foreclosures were conducted by entities that did not hold the mortgage at the time the foreclosure was commenced. The sample I chose for this study consisted of the first 100 foreclosure deeds recorded in 2007 for property in Lowell. While the date and size of that sample are somewhat arbitrary, the experience with foreclosures in Lowell mirrored that in other urban communities in the Commonwealth making the study representative in that respect.

In each case, I compared the lender on the original mortgage with the entity that conducted the foreclosure. If they were not the same, I located any intervening assignments and made note of the parties. Since the registry of deeds index only contains the date a document is recorded, I also captured from the documents themselves the date each assignment was executed and the date of publication of the first notice of mortgagee's sale (which *Ibanez* identifies as the critical date for assignment purposes) from each foreclosure deed.

For the 100 foreclosures examined, here is what I found:

- In 19 cases, the entity conducting the foreclosure was the same one that made the original loan, so no assignment was involved.
- In 20 cases, an assignment from the original lender to the entity conducting the foreclosure was both executed and recorded before the notice of sale was published.
- In 29 cases, an assignment from the original lender to the entity conducting the foreclosure was executed before the notice of sale was published, but was not recorded until after.
- In 27 cases, an assignment from the original lender to the entity conducting the foreclosure was neither executed nor recorded until after the notice of sale was already published.
- In five cases, there was no assignment transferring the mortgage from the original lender to the entity conducting the foreclosure.

The 19 cases where the lender conducted the foreclosure would not present any problem with assignments (although in seven of those cases, the foreclosure was conducted by Mortgage Electronic Registration Systems (MERS), which might present other questions relative to the relationship between the note and the mortgage). The five cases in which no assignment to the foreclosing entity is on record clearly are problematic since there is no evidence that the party conducting the foreclosure had the legal right to do so.

The 20 cases in which the assignment was both executed and recorded before the notice of sale would appear problem free, but the remaining 56 cases raise a variety of questions. *Ibanez* makes it clear that the assignment must be made but not necessarily recorded – although recording is preferable – prior to the notice of sale. Setting aside allegations of robo-signing and invalid acknowledgements, this would mean that the 29 cases in which the assignment was executed before the notice of sale was first published but only recorded after that would be valid and would not void the foreclosure.

The same is not necessarily the case for the remaining foreclosures. For the five in which no assignment appears on record, there would at least be a presumption that those foreclosures were void. This would also be true for the 27 cases in which the assignment was both executed and recorded after the notice of sale was published. This presumption of voidness might be rebutted if the parties produced evidence such as an email, a letter or a computer printout sufficient to document that the assignment had been made earlier. There is no mathematical formula for determining when an assignment was made; rather it is a question of fact to be determined by the circumstances of each case. By that standard, even the five foreclosures that have no assignments might be rehabilitated with the proper proof.

While it might be legally possible to salvage these 32 foreclosures (the 27 with untimely assignments and the five with none), that assumes that the financial institutions whose "utter carelessness" – to borrow Cordy's phrase – created the problem in the first place would now be capable of producing credible and timely documentary evidence of transfers. More likely, the 32 foreclosures with untimely or missing assignments will be considered void and will require some type of remediation.

Beyond the untimely and missing assignments, this study has raised other troubling issues. For instance, the 29 assignments that were signed prior to the first notice of sale but were not recorded until after may have complied with the letter of the law (that an assignment need not be recorded to "make" the assignment), but they still might support contractual or consumer protection claims against the lenders since the absence of an assignment on record prior to the notice of sale might tend to suppress the interest of potential bidders at the foreclosure auction.

But the focus of this article is the validity of foreclosures and not on collateral problems. As stated above, this study is by no means scientific but it does provide an accurate glimpse at what is contained in our real estate records. While further study is needed to fully assess the scale of this problem statewide, the finding of this analysis that fully one-third of the foreclosures studied are facially void due to untimely or missing assignments suggests that the consequences of this problem will be severe and long-lasting.

A frequent contributor to *REBA News*, Dick Howe has served as register of the Middlesex North District Registry of Deeds since 1995. He writes a blog on public records issues and concerns, which can be found at www.lowelldeeds.com. He can be contacted at richard.howe@sec.state.ma.us.

STEIN: *Eaton* after *Culhane* and *McKenna*

CONTINUED FROM PAGE 2

It conveyed to MERS, as nominee for Preferred, only bare legal title to the mortgage. An employee of Aurora, who, by corporate resolution, was also an authorized signatory for MERS, executed the assignment from MERS to Aurora. At the time of the assignment, Aurora was already acting as servicing agent for Deutsche Bank.

The court held that "there was no flaw with this process." Under Massachusetts Law, MERS lawfully held the legal title to Culhane's mortgage in trust and a purported officer of MERS signed the assignment to Aurora pursuant to M.G.L. c. 183, §54B. The assignment united the holder of the mortgage with the holder of the note. As to the fact that assignments are made on behalf of MERS by parties who wear "two hats," the court held that it "can discern no way in which MERS' procedure for assigning mortgages contradicts M.G.L. 183, §54B."

MERS acts at the direction of the note holder, which retains a beneficial interest, does not own mortgage loans and, according to the language that appears in the standard MERS mortgage, MERS holds only legal title to the interests granted by the borrower. The court notes that "It is as if by clever design that the MERS system fits perfectly into the Massachusetts model for the separation of legal and beneficial ownership of mortgages."

The court next looks at the power of MERS to assign the mortgage, a right which is not specifically mentioned in the MERS contract. MERS, as nominee, has the right to exercise any or all of the note holder's interests, including the right to foreclose, release and cancel the mortgage. In reviewing the MERS contract, the court notes that, although the mortgage instrument grants to MERS authorization to exercise all the rights of the note holder, the MERS contract provides that MERS, as nominee, may only exercise the rights of the note holder, "if necessary to comply with law or custom."

Massachusetts law provides that an entity seeking to foreclose must hold the mortgage. As MERS does not own the underlying debt, it cannot exercise the power of sale, despite the language in the MERS contract. The court wrote, "It cannot be that no party may exercise the power of sale." Therefore, law or custom necessitate that prior to commencing foreclosure proceedings, the mortgagee must assign its interest to either the note holder or the servicer for the note holder.

The fact that MERS never holds the underlying debt makes it clear that, despite the language in the MERS contract, MERS cannot foreclose in its own name. MERS Rule 8(d), which became effective on July 22, 2011, revoked the authority to initiate foreclosures and file legal proceedings in the name of MERS.

BIFURCATING NOTE AND MORTGAGE

In the case of *Wells Fargo Bank, N.A. v. Suzette McKenna*, Land Court 11 MISC 447455, the defendant challenged the standing to the plaintiff to bring an action pursuant to the Servicemembers Civil Relief Act alleging that the plaintiff is not the current holder of the mortgage.

The plaintiff demonstrated to the court that it was the original mortgagee and that no assignment of the mortgage had been recorded in the registry. Piper, writing for the court, held that the "defendant's contention that the plaintiff is not the current holder of the mortgage utterly lacks factual foundation and is devoid of merit."

Piper then considers the impact on standing that might exist if the ownership of the mortgage and note were bifurcated. Acknowledging that there is no evidence in this case that the note and mortgage have been bifurcated, Piper states that, even if the mortgage and note were held by different parties, "that would not demonstrate a lack of standing to bring this action for a determination of defendant's entitlement to the benefits of the act."

In a lengthy footnote, Piper then considers the *Culhane* and lower court *Eaton* decisions. Predicting that the Supreme Judicial Court will not adopt the principal set forth in the Trial Court in *Eaton*, Piper warns that if this does happen, "there will be wide-ranging adverse title impacts. …. If the law is foreclosure by a mortgage holder lacking the note invalidates the resulting title, that risk will infect foreclosures going back many years."

The opinion states that the practice in Massachusetts for generations "never has permitted the question of ownership of the note to disturb otherwise regular recorded mortgage foreclosure titles."

Piper closed with strong words, stating that "there is no basis in Massachusetts for the view that a valid mortgage foreclosure requires the foreclosing mortgage holder to possess the promissory note which the mortgage secures," and warned that adoption of this principle "would engender wide-spread challenges to the title which have come out of mortgage foreclosures over many years."

Piper's decision brings a ray of hope to the conveyancing community. A decision in *Eaton* that a mortgagee must also prove it held the note at the time of foreclosure, will throw numerous titles into flux. Presumably, even a seemingly valid possession for three years will not rescue the title, unless the party taking possession can show it was both mortgagee and note holder.

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State Appeals Court sets certoriari review trigger of local board's decision

BY LUKE H. LEGERE

The Massachusetts Appeals Court recently settled the question of when the clock begins running to file a court appeal for certiorari review under M.G.L. ch. 249, §4. This is a type of court challenge common to tribunal decisions made outside the ambit of zoning, where a statutory type of review is provided in the Zoning Act.

In the land use and environmental context, certiorari review applies to such boards as local conservation commissions under Home Rule wetland bylaws, boards of health under state codes and local regulations, sand and gravel/earth removal boards under general bylaws, historic commissions outside the zoning context, boards of public works for sewer, water, electric and roadway issues, boards of selectmen (under various non-zoning bylaws and state laws), and city councils for certain land use decision making.

Outside the real estate context, of course, our selectmen, school boards, and many other local, regional and state tribunals have become very familiar with certiorari review.

Certiorari review is limited to the administrative record upon which the challenged decision was based, essentially on a "certified record" of the proceedings.

The certiorari statute requires that an appeal "shall be commenced within 60 days next after the proceeding complained of." Counsel for parties wishing to appeal the decision of a local board have long disagreed whether this language required that a lawsuit be filed within 60 days of the date the board voted, the date the client received notification of the decision, or instead the date that the written permit, denial, or order was actually issued.

To some it appeared logical to start the 60 days running at the board vote or other action or inaction that had operative legal effect, especially when any later board writing was optional, just ministerial, or merely memorialized the decision.

To others it seemed common sense to run the 60 days from the phone call, letter, or other actual notice the prospective plaintiff learned of the decision.

Luke Legere

To still others it looked appropriate to count from the date of the ultimate written document, especially when it is a permit type approval or disapproval. After all, one cannot read it, and assess it for potential suit, until understanding the nature and reasons for any disapproval or the conditions imposed in any approval.

The Appeals Court decided in July, and the Supreme Judicial Court denied further appellate review in September, the case of *Carney v. Town of Framingham*, 79 Mass. App. Ct. 1129, *review denied*, 460 Mass. 1111 (2011).

This ruling is an unpublished disposition. Rule 1:28 decisions of the Appeals Court are primarily addressed to the parties and so may not fully address the facts of the case or decision rationale. They are not circulated to the entire court and so represent only the view of the case panel. They may be cited for persuasive value, not binding precedent.

This Appeals Court decision provides an important lesson for real estate and land use lawyers representing clients who are subject to local board enforcement. The date of issuance on the enforcement order is irrelevant for determining the deadline for filing a certiorari appeal. The 60-day period to file a petition for certiorari review will begin running on the day the vote is taken to issue the enforcement order.

On April 2, 2008, the Framingham Conservation Commission voted to issue an enforcement order to the plaintiff, William Carney, for alleged violations of the state Wetlands Protection Act and the Town's wetlands bylaw. The enforcement order (which was preceded by a notice of violation) required that Carney submit a restoration plan, which he did. The commission considered the matter at its June 4, 2008 meeting, and voted that same day to amend the enforcement order. On June 6, 2008, the commission issued the amended enforcement order.

On Aug. 5, 2008, Carney filed a complaint in Superior Court pursuant to G.L. c. 249, § 4, seeking certiorari review of the decision to issue the enforcement order. On summary judgment, the Superior Court granted the town's motion to dismiss Carney's complaint as untimely. Carney challenged this decision, alleging that the Superior Court judge erred in dismissing his action.

The Appeals Court discussed the language in M.G.L. ch. 249, §4 and cited earlier cases. The key pronouncement of the Appeals Court is the proposition that the last administrative action occurs when the administrative agency votes on an issue, not later, when the determination is written.

Therefore, the Appeals Court, and the SJC by not taking further review, determined that Carney's appeal of the board's enforcement order was filed late and properly dismissed.

Incidentally, the court left open the question of whether the "last agency action" was April 2, 2008 (the hearing at which the commission voted to issue the original enforcement order) or June 4, 2008 (the hearing at which the commission voted to issue the amended order) because the complaint, filed on Aug. 5, 2008, was filed more than 60 days after either date.

Litigators should file the certiorari complaint sooner, rather than later, if clients wish to appeal a local board's enforcement order. This likely would apply as well to appealing other enforcement actions such as permit revocation and other sanctions imposed.

Depending on timing of events, this suit may be due in court a short time after (or even before) your client receives the written decision or meeting minutes that explain the basis and reasons for the decision to be challenged.

Advise your client to take careful notes of the meeting or hearing; better still, audio- or videotape it, and best to transcribe it with a stenographer so as to have a reliable record of the presentations, submittals, discussions, motions, votes and stated

See LEGERE, page 9

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Massachusetts conveyancing practice for more than a century. The Supreme Judicial Court's decisions in *Ibanez* and *Bevilacqua* have identified the failures but have done little to help resolve the resulting title issues. As this column is written, we are again holding our collective breaths waiting for the decision from the SJC in *Eaton*, addressing whether the lender must now demonstrate physical possession of the note in order to conduct a valid foreclosure.

No one knows how many titles are affected statewide, but the number is likely in the thousands. In many cases, because of bank mergers and failures, as well as administrative negligence, original loan documentation – including promissory notes – may never be found. Inaction is not an option. It is both unjust and a serous drain on our already faltering economy to leave these tainted properties in indefinite marketability limbo. A solution must be found to cure these defective titles. REBA must be a part of that solution.

REBA must also redirect its attention to the *NREIS* litigation. Despite a solid victory before the SJC, the fight is far from over. Back before the First Circuit this fall, NREIS would not even agree in mediation to a listing of those elements of conveyancing that are or are not the practice of law. Consequently the case has been remanded to the Federal District Court and now may enter an additional discover phase in preparation for trial This is likely to be a long, costly and tedious process, requiring our persistence and resolve. But REBA must prevail in this all-important fight for our members, the bar, and the home-buying citizens of the commonwealth.

An essential element in REBA's ongoing war against the unauthorized practice of law (UPL) is the work of Massachusetts Attorney's Title Group (MassATG). MassATG, launched in 2008 as a nonprofit corporation, to support the funding of REBA's litigation on the practice of law by non-lawyers front. Since its inception, MassATG has donated $130,000 to support REBA's efforts in the *NREIS* litigation. Our member dues and other sources of revenue (including REBA Dispute Resolution) cannot alone cover the cost of this litigation and other UPL initiatives. The ongoing success and growth of MassATG is crucial to this element of REBA's core mission.

When a title insurance policy is issued by CATIC through MassATG, a portion of the premium goes directly to fund REBA's UPL efforts. As the battle continues on a variety of fronts, our war chest must be refreshed. Every member's participation is essential to this effort. Become a MassATG agent today. REBA neither asks nor expects that you issue policies exclusively with MassATG, though of course that would be appreciated. We know that the real estate market remains sluggish. For many conveyancers transactions are few and far between. We also recognize you have existing and long-standing relationships with other underwriters. But if every REBA conveyancer were to become a MassATG agent and issue a single policy each year with CATIC through this group, the ongoing legal expenses of the *NREIS* litigation would be met and the funding of future initiatives guaranteed.

Become a MassATG issuing agent today and you will have personally advanced REBA's essential work on behalf of the Massachusetts real estate community and the home-buying public.

Chris Pitt is an attorney at Robinson & Cole, LLP in Boston, and is the 2012 president of the Real Estate Bar Association for Massachusetts. He can be reached at cpitt@rc.com.

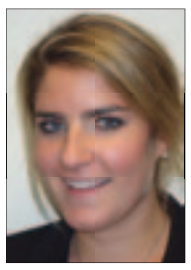
Green leases: A solution to the practical and legal challenges of green building

BY KARA C. PLUNKETT

The goals of green building – to increase building efficiency and reduce the building's impact on the environment and human health through the efficient use of energy, water, building materials and operational practices – remain constant, but the construction methods, building materials and architectural design for green buildings are perpetually evolving. These goals as well as the challenges associated with government regulation of green building, suggest that green leasing presents an effective solution to supplement green building regulations with the ultimate goal of transforming the built environment to complement, instead of conflict with, the natural environment.

The built environment is a fundamental element of human civilization but one that inflicts enormous harm on the natural environment. Designing structures that complement rather than conflict with nature can mitigate the adverse impacts of buildings. This process, commonly known as green building, strives to reduce the ecological footprint of buildings by constructing and operating buildings to use less energy, consume fewer natural resources, and emit fewer pollutants into the environment than conventional buildings. Green buildings use natural light and improve ventilation to provide a healthier indoor environment for their occupants. Additionally, greater efficiencies allow green buildings to have lower operating and maintenance costs over the course of the building's life. Studies indicate that green buildings sell at higher prices, garner higher rent premiums and have higher occupancy rates than conventional buildings. Green buildings benefit developers, owners and tenants of commercial buildings by reducing operating costs, increasing market value and improving the health and productivity of occupants.

Commercial leases negotiated between private parties that address greenhouse gas (GHG) emissions, energy use and resource consumption have the potential to significantly reduce the ecological footprint of both green and conventional office buildings. This practice, known as green leasing, capitalizes on market forces to operate buildings more efficiently. Green leases could play a substantial role in mitigating the cumulative ecological footprint of commercial buildings because most commercial office space is leased. Moreover, the majority of office space that will be available in 2020 is already built and green leasing presents a way to operate conventional buildings more efficiently.


Kara Plunkett

Green leases are simply conventional leases, which include provisions addressing energy efficiency, water conservation, recycling, the use of green products, and indoor environmental quality. The green provisions can be added as an exhibit to a standard commercial lease or integrated into a standard lease on a clause-by-clause basis. A green lease allocates the obligations and rights for achieving and maintaining green standards and identifies remedies and consequences for failure to comply with the terms. A green lease fulfills sustainability objectives by contractually holding landlords and tenants accountable to each other.

Ideally, a green lease is a collaborative effort between landlord and tenant. Negotiating parties need to ensure that leases are structured to create compulsion, incentive and flexibility for both parties to do the right thing. Incentives are integral to the success of a green lease, since commercial buildings and their tenants are businesses operating to maximize profits. A well-drafted green lease with clearly defined costs, benefits, and responsibilities will not deprive building owners of profit nor will it burden tenants alone with extraneous costs. Instead, it will maximize incentives and minimize disincentives to achieve both environmental and business goals. Some common solutions include creating operating cost provisions, individually metering tenant spaces, purchasing carbon offsets, amortizing green-related costs such as certification fees, insurance and costs of modifying or upgrading equipment, and setting benchmarks and performance targets.

Landlords and tenants may be hesitant to enter into green leases because of concern over heightened risks associated with going green. However, a well-drafted lease can manage potential risks. Most green leases address key provisions including term, operating expenses, permitted uses, insurance, property taxes, tenant improvements and alterations, tenant maintenance and repairs, parking, access by landlord, solid waste management, signs, utilities, assignments and subletting, housekeeping and maintenance, and relocation of the tenant. Longer leases are likely more effective in conserving resources, reducing waste, and mitigating environmental impacts of materials, manufacture, and transport resulting changes in tenants.

Multiple trade associations and entrepreneurs have written green lease forms and drafted conceptual guidelines for use by the private sector. Two popular guides are the "National Standard Green Office Lease for Single-Building Projects," authored by the Real Property Association of Canada (REALpac) and the "Guide to Writing a Commercial Real Estate Lease" (also known as the "BOMA Green Lease Guide"), created by the Building Owners and Managers Association. Both guides favor the landlord, but tenants with significant bargaining power can negotiate for more equitable provisions. REALpac requires tenants to achieve certain specified targets by inserting green provisions into a traditional net lease and adding a green rider. The BOMA Green Lease Guide integrates green lease provisions into a standard BOMA commercial lease. Consequently, the BOMA Green Lease Guide does not translate to other standard leases as seamlessly as the REALpac guide. Nonetheless, the BOMA Green Lease Guide is useful because it includes commentary on each green provision, which gives negotiating parties the opportunity to make fully informed decisions. Additionally, by blending green provisions directly into the text of lease, the BOMA Green Lease Guide prohibits a tenant from nullifying the effect of a green lease by deleting the green rider.

Owners of conventional buildings are concerned that their buildings will become obsolete within a few years. In fact, the recent increase in investor-owned green buildings demonstrates the growing popularity of green buildings. Moreover, the long-term nature of commercial leases means that landlords and tenants cannot wait for governments to agree on appropriate standards for energy efficiency and resource consumption.

The green building movement has evolved rapidly and demand for green buildings is becoming increasingly prevalent. Commercial tenants enjoy improved health and increased productivity amongst their workforce, reap marketing benefits associated with a green image, and reduce expenses related to energy efficiency. Likewise, landlords benefit from reduced operating costs and profit from the green image, which attracts more tenants, allowing them to charge higher rent premiums. Green leasing provides private parties with a framework to meet green building goals and mitigates the impact of the built environment by significantly reducing GHG emissions, energy use, and resource consumption associated with commercial buildings.

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RESPA: Unearned fees

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traditional notice-and-comment rulemaking or any similar deliberative process and does not identify any clear methodology by which it reached its conclusion."

THE SUPREME COURT AGREES TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS

Fifth Circuit's decision was in agreement with the Fourth, Seventh, and Eighth Circuits' interpretation of Section 8(b), but directly at odds with the Second, Third, and Eleventh Circuits' interpretation. The Supreme Court, recognizing the conflict between the Circuit Courts, and the divergent interpretation of HUD, granted *certiorari* in October in order to parse the Section 8(b) language itself.

A decision that Section 8(b) prohibits all unearned fees would provide a uniform construction of the statute and ensure consistent practices across all jurisdictions. A decision affirming the Fifth Circuit and restricting the scope of Section 8(b) to situations where the unearned fee is split between two parties could have two consequences. First, any restriction on the statute's sweep would necessarily limit the claims that could be made against settlement service providers. More broadly, however, a decision overruling HUD's construction of the statute could also signal that regulatory agencies should have a reduced role in construing the often abstract statutory language that is the product of legislative compromise. When the precise boundaries of an imprecise statute are set by one or more of the 850 federal court judges, and not by the agency with statutory responsibility for interpreting the statute, litigation and uncertainty are bound to increase.

A decision by the Supreme Court is expected by June.

Doug Salvesen is co-chair of REBA's litigation committee. He has served for 20 years as counsel to the association's committee on the practice of law by non-lawyers. He is the architect of REBA's success in the SJC decision, *REBA vs. NREIS*. Doug can be contacted by email at dws@bizlit.com. Noemi Kawamoto is an associate at Yurko, Salvesen & Remz where she works tirelessly on civil and business litigation. She is a 2009 graduate of Boston University School of Law and was the Administrative Editor for the Law Review.

NEXT STEPS: What to do after *Ibanez*, *Bevilacqua* decisions

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and the SJC affirmed in *Bevilacqua v. Rodriguez* (Oct. 18, 2011), that Bevilacqua lacked standing to bring the petition because he did not hold record title, despite the recorded deed purporting to convey the property to him. The courts held that because the earlier foreclosure had been void, Bevilacqua did not hold any title at all.

As an alternative theory, Bevilacqua also sought protection as a bona fide purchaser for value with no notice of the defect at the time he purchased the property. The SJC rejected this argument. It reaffirmed that a defective foreclosure is void and therefore a third-party buyer cannot be a bona fide purchaser. The SJC went on to rule that buyers such as Bevilacqua are not bona fide purchasers in any event because at the time of his purchase, Bevilacqua would have been on record notice that the foreclosure had predated the assignment of the mortgage to the foreclosing entity. Prior to *Ibanez*, this was by no means uncommon; however, Bevilacqua's inability to foresee the *Ibanez* decision was sufficient to deprive him of bona fide purchaser status.

David Glod

Jeff Loeb

Bevilacqua is not alone in the resulting quandary – there must be thousands of similarly situated homeowners throughout Massachusetts. It is important to note that this problem arises where there is an invalid foreclosure anywhere in the chain of title – it could be, as in Bevilacqua's case, two conveyances back, or just as easily 10 conveyances back. The question that homeowners like Bevilacqua are left with is: what can they do to resolve the *Ibanez* problem and regain clear title to the homes they thought they had purchased?

One potential solution is to locate the prior foreclosed-upon owner and negotiate a resolution directly, in which the property is deeded to the present occupant. This may be the cleanest and fastest method, provided an agreement can be reached. However, the prior owner may not be able to be found (as was the case with Bevilacqua's predecessor, Pablo Rodriguez). In addition, if the prior owner filed bankruptcy, the improperly foreclosed-on property may unbeknownst to the bankruptcy trustee still be an asset of the bankruptcy estate. There may also be one or more junior lienholders whose liens, previously thought to have been extinguished by the foreclosure, will have been resurrected – in which case these would also need to be dealt with in order to establish clear title.

The *Ibanez* decision left open another cure by holding that the assignment to the foreclosing entity need not be recorded or even in recordable form in order to be effective. There simply needs to be a writing showing the transfer of the mortgage. Thus, it is possible that the problem can be solved by locating an off-record assignment that predates the first publication of the foreclosure notice. The court also noted that where 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 mortgages clearly and specifically identifying the mortgage at issue, *may* suffice to establish the trustee as the mortgage holder. However in practice, it may be difficult or impossible to locate such documents, particularly if significant time has passed since the assignment.

Another possibility is that a person in Bevilacqua's position could establish good title by re-foreclosing. In *Bevilacqua v. Rodriguez*, the SJC recognized the theory that a defective foreclosure deed which is ineffective to pass title can nevertheless operate as an assignment of the mortgage itself. Therefore, so long as the assignment to the foreclosing entity predates the foreclosure deed out of that entity, the buyer at the foreclosure sale becomes the holder of the mortgage. Any subsequent deed out of that buyer, in turn, conveys whatever interest he holds in the property – namely, that of a mortgagee. As a mortgagee, the present occupant can re-foreclose on the improperly foreclosed-upon owner.

There are two primary methods of foreclosure in Massachusetts: by power of sale contained in the mortgage, and by entry and possession. Conducting a foreclosure sale can be a time-consuming and expensive process. Moreover, in a public auction there is no way to ensure that the foreclosing present occupant will be the highest bidder – he could potentially lose the very property to which he is attempting to clear title. The more conservative approach is to record a certificate of entry; after three years of continued possession, the mortgagor's right of redemption is foreclosed. One potential weakness of foreclosure by entry is that whether "possession" has been "continued" for the requisite period is a factual determination, and arguably could always be subject to challenge.

One point of caution with regard to re-foreclosure is the possibility of another impending sea change in the mortgage industry. The Supreme Judicial Court is currently considering *Eaton v. FNMA*, which raises the question whether a foreclosing entity must hold not only the mortgage, but also the note, in order to validly foreclose. If the SJC decides that the mortgage and note must be reunited, it will fly in the face of decades of commonly accepted practice and have even greater repercussions than *Ibanez*. However, for the re-foreclosing homeowner, it will simply require the extra step of obtaining the note prior to beginning the foreclosure sale process or recording a certificate of entry.

Ultimately, there is not a judicial silver bullet by which an *Ibanez* problem can be quickly and inexpensively resolved. If there is to be a complete remedy, it will be up to the legislature to fashion one with retroactive effect, as it did when amending the Obsolete Mortgages statute in 2006. Until then, there are a number of options open to homeowners in Bevilacqua's position, one or another of which may be viable depending on the particular circumstances. As increasing numbers of defective titles are discovered in the wake of *Ibanez*, lawyers and other professionals in the conveyancing industry must remain alert to these continually developing issues.

Jeff Loeb is a shareholder at Rich May, PC in Boston. Jeff can be reached at jloeb@richmaylaw.com. David Glod is an associate at Rich May. David can be reached at DGlod@RichMayLaw.com. Both represent Fran Bevilacqua and other similarly situated buyers in their quest to clean up the title to their property.

COMMENTARY

Bevilacqua and my new business model

BY PAUL F. ALPHEN

The NBA lockout is over. It was started by claims by the league that it was losing $300 million per year. Apparently the NBA was looking for a modified business model to survive in the great recession. I do not think that anyone believes that the NBA's problems were solved with the new collective bargaining agreement, but it is apparent that the owners knew that business-as-usual had to change.

Attorneys have also abandoned old business-as-usual practices during the great recession. I am still searching for ways to improve my business model and take some steps so that our time can be used more efficiently. I am thinking about using our brethren in the medical profession as role models, because they seem to make productive use of the business day, but have also (apparently) maintained the admiration and respect of their patients.

Paul Alphen

Under the new medical-based model, once a residential homeowner becomes interested in representation in the sale of their home, I anticipate the following steps:

First, clients should call my office between the designated hours within which our office accepts calls for new appointments, and leave a voice mail message. Someone may call them back within 48 hours and make an appointment for a meeting three or four weeks thereafter. Once they arrive for their appointment they will be "greeted" by a completely disinterested receptionist behind protective glass who will demand payment up front and then toss the client a clip board with a 20-page questionnaire. We will ask every client to list the book and page of every deed, mortgage, easement, reservation, restriction and encumbrance of every property within which they held a real interest at some point in their lives. Then they will sit in our waiting room for two hours.

After the two-hour wait, they will meet with a paralegal, who will ask to see copies of the client's deed, mortgage and title insurance policy and review the answers on the 20-page questionnaire. The clients will not have to change into a hospital gown, however. We will leave the client to wait further before meeting with an attorney. The attorney will enter the room and barely look up from his/her laptop. The attorney will recommend a title examination, ask that the client make arrangements to have a title examination performed by a third party and have the title examiner forward the abstract to the attorney and then make an appointment to meet with the attorney again three weeks thereafter, shake the client's hand and leave the room.

Three weeks later, the client will return. They will pay up front, fill out the same 20-page questionnaire, wait two hours, and meet with the paralegal. After a further wait, the laptop-toting attorney will enter the examination room and tell the client that the prior owner acquired title by way of foreclosure by a bank that did not hold a valid assignment from the servicer of the mortgage-backed trust, who was the holder of the mortgage of record. The attorney will tell the client that in *Bevilacqua v. Rodriguez*, 460 Mass 762, 955 NE2d 884 (2011), the Supreme Judicial Court ruled that "a litigant who asserts that he or she is the holder of a mortgage necessarily asserts that the mortgage continues to exist and that the mortgagor's claims to the property remain valid … For a plaintiff to both claim record title as holder of a mortgage and to dispute the respondent's continuing equitable title or equity of redemption would be oxymoronic … To assert that he holds legal title as mortgagee, [the client] must necessarily accept that [the prior owner of record] has a complementary claim to either equitable title (if there has been no default) or an equity of redemption (if default has occurred). In either case, … [the client] cannot be heard to argue that [the prior owner's] claim is adverse to his own."

The attorney will then stand up, tell the client that they have a fatal title defect and he/she must make an appointment with a specialist and/or file a claim against their owner's policy. Then the attorney will shake the client's hand and leave the room toting the laptop. The meeting may take a total of five minutes, notwithstanding that the client has been advised that their title has a fatal defect and the client is not the owner of his/her home.

Under my new business model, I will allocate 10 minutes for a refinance and 30 minutes for a full closing. I am still not sure what to do with the buyers, sellers, brokers and their respective offspring and/or parents once their 30 minutes are up and there remains an important outstanding issue like half-empty paint cans in the basement. I have to come up with another way to say "You don't have to go home, but you can't stay here!"

Of course, I am kidding (and, I appreciate that the medical profession is stuck between ever increasing overhead and increased demands by health insurance providers).

In my experience, I have found transactional attorneys to be overly generous of their time and extraordinary in their abilities to efficiently indentify and resolve issues that could otherwise derail a deal. More importantly, often the parties never know of the time and skill employed to resolve or avoid title defects. I think that as matter of practice most of us have concluded that it is quicker to attack and resolve most title issues, than to attempt to explain the issue, potential solutions and additional fees to the buyers, seller, brokers and their respective relatives.

I look forward to the Great and General Court repairing the title problems created by the mortgage foreclosure mess and the court decisions that followed.

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.

MORIARTY: Free speech and condo associations

CONTINUED FROM PAGE 2

The Noble court also did not specifically hold that the constitution would apply to community association boards.

In another case, *Franklin v. Spadafora*, 388 Mass. 764 (2983), the Massachusetts Supreme Judicial Court assumed the existence of a state action, but it did not actually reach the question, because the court had already determined that the by-law did not deprive the plaintiff of any constitutional rights.

While many condominium cases have offered the opportunity for Massachusetts courts to apply the constitution in similar circumstances, this Appeals Court in Old Colony Village is the first to accept the invitation. And its decision represents a dramatic departure from the way in which other Massachusetts courts have applied the first amendment to private property owners.

The court's reliance upon the hybrid nature of condominium ownership is curious. After acknowledging that other courts have concluded that "the First Amendment does not prevent a property owner from restricting the exercise of free speech on private property," the court went on to note that the relationship between a condominium owner and a community association differs from that between "a member of the public and some third party's private property."

This is absolutely true; a community association does have a different relationship with owners – a relationship that arguably makes a common interest ownership community even more private than private property owned by a third party and even less subject to constitutional restrictions. It is difficult to understand this court's contrary conclusion that "a condominium association does not have as free a hand in restricting the speech of unit owners in the common areas in which [the] owners share an undivided property interest as another property owner might in dealing with a stranger on his or her property."

STAGGERING IMPLICATIONS

If this decision stands, the precedent will have potentially staggering implications, not just for community associations but for private entities of all kinds. Up until this time, the broad "state action" analysis adopted by the Appeals Court has been limited primarily to instances of invidious discrimination or to significant public policy concerns affecting speech (e.g., limitations on the press). In this day and age, you'd be hard-pressed to find many organizations that aren't regulated by statutes or regulations, and court action is how we resolve disputes in this country. If all you need to trigger "state action" is an underlying statute and court action to enforce it, all bets are off. There's no way to predict where the limits on the authority of private entities might be drawn. A court might find, for example, that rules restricting the use of company computers or regulating the language used in company e-mails interfered with the free speech rights of employees.

Admittedly, this court went to some lengths to emphasize that its decision should be construed narrowly. "Because we recognize the delicacy and importance of the balance between, on the one hand, the needs of condominium owners to act collectively through rulemaking to create a desirable living environment and, on the other, the rights of individual unit owners, we emphasize the narrowness of our holding. We do not hold condominium restrictions on speech and expressive conduct may never be enforceable …" the court said. "We hold only that when an action is brought [under state law] claiming the breach of such restrictions … the restrictions are subject to scrutiny under the First Amendment."

The court considered only the central question in this case – whether constitutional standards applied to the rule the board sought to enforce. It specifically did not consider whether the rule itself would pass constitutional muster, nor did it consider whether owners who purchase a condominium unit voluntarily waive their constitutional rights, leaving both questions "for another day."

UNANSWERED QUESTIONS

In the meantime, the decision leaves other critical questions unanswered, among them: Could an association avoid "state action" triggering constitutional requirements if instead of seeking to enforce its rights under a state statute, it based enforcement actions on the association's bylaws or covenants alone? There are cases, as mentioned above, in significantly different contexts, suggesting that resort to the court would itself be sufficient to trigger state action, because enforcement of the condominium documents would itself be premised upon state common law principles. If constitutional standards are going to apply to association rules, what level of scrutiny will the courts use in evaluating them?

Under the most rigorous constitutional test, a restriction must fulfill "a compelling governmental interest" that can't be achieved by other less restrictive means. This would be a nightmare for community associations, subjecting virtually any rule or enforcement action to a standard that few would be able to meet.

In its decision, the court implied, without stating, that the "compelling interest" standard would not necessarily apply. A lower level of constitutional scrutiny – whether a rule is rationally related to a legitimate purpose of the organization – would set the bar much lower and might not be much different from the "reasonable person" standard that guides, or should guide, community association rulemaking today.

It's not as if boards have unfettered authority to impose any restrictions they can manufacture; the courts have held consistently that a community association's rules and enforcement actions must be reasonable. But will rules that pass the "reasonable person" standard today also pass the standard of constitutional scrutiny the courts will apply?

That's a question – one of many – the courts will have to resolve if this decision stands.

REBA's 2010 president, Tom Moriarty currently co-chairs the association's residential conveyancing committee and the practice of law committee. A partner with the Braintree firm of Marcus Errico Emmer & Brooks, P.C., Tom can be reached at tmoriarty@meeb.com.

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reasons (if any) for the decision the client may wish to consider challenging.

We believe this decision applies to several other types of conservation commission (and other land use board) decisions beyond enforcement situations. Good examples are actions on permit extensions (beyond the first term of years) and rulings on certificates of compliance (approving usually with some continuing conditions).

Like enforcement orders, these are not appealable to MassDEP and there is no statutory appeal route. Appeal is to court in the nature of certiorari and the operative end of the proceeding is the board vote, even though it is to be memorialized in a written document later.

Real estate and environmental attorneys will want to consider carefully whether and how this ruling, and this way of calculating the 60-day deadline, applies to board actions outside the enforcement setting, such as those culminating in permits from conservation commissions and other non-zoning boards.

For permit decisions, in contrast to enforcement situations, it is worth noting that the state Wetlands Protection Act, the MassDEP regulations, the state permit form itself, most Home Rule wetlands bylaws, many conservation commission regulations, and the local permit form itself, all contemplate or specify that the issuance date is the date on the form, which in turn is the date of mailing or attempted first delivery to the permit applicant.

While appeals from the state wetlands permit (or denial or inaction) are to MassDEP, by statute, appeals from the local bylaw permit decisions are to court in the nature of certiorari. Many such certiorari cases over the years were filed within 60 days from permit issuance or denial, but longer than 60 days from the last hearing or meeting. Some of these cases are still pending.

The straightforward language of the Appeals Court here, approved by the SJC, draws on earlier decisions: "The last administration action occurs when the administrative agency makes a final decision on the issue at hand, not when it memorializes that determination in written form."

On the other hand, in a key earlier decision cited by the Appeals Court, the Appeals Court itself described the legal deadline as running from what is the "operative" conclusion of the proceedings complained of. In that case it found the "critical event" was the date a hearing officer issued the final decision of a committee or, at the latest, when the plaintiff received seasonable notice of it. *Committee for Public Counsel Services v. Lookner*, 47 Mass. App. Ct. 833, at 837 (1999).

After the recent *Carney* case and recalling the *Lookner* case, we will be careful to count the 60-day certiorari statute of limitations from the critical event that is the operative conclusion of the board proceeding, commonly the date the board makes its final decision on the issue at hand or, at the latest, seasonable notice thereof to the applicant.

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MERS: Not a replacement for public records

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The MERS system is not a legal system of record, and it is certainly not a replacement for the public land records. No interests in the mortgage loans are transferred by an entry on the MERS system – they are only tracked.

At closing, homebuyers agree to MERS' role as the mortgagee of record. There is standard and unambiguous language on the first few pages of their mortgage instrument, which discloses the naming and designation of MERS as the mortgagee, and the homeowner specifically agrees that MERS may act on behalf of the original lender and the lender's successors and assigns (i.e., subsequent purchasers of the mortgage loan). As a result, there is no need for an assignment of the mortgage when servicing rights or ownership of the promissory note is transferred to other members using the MERS system. Because MERS remains the mortgagee holding the lien, there is no recordable transfer to record in land records. However, if MERS does assign its mortgage, that transfer is recorded (and applicable recording fees are paid) so that the public records reflect the name of the mortgagee of record succeeding MERS.

The Massachusetts Land Court has twice reviewed the use of MERS with respect to registered land (May 1, 2000, revised Feb. 27, 2009). Guideline No. 42 expressly states: "The holder of the mortgage on the encumbrance sheet will be listed as Mortgage Electronic Registration Systems, Inc., without any reference to the institution for which MERS is holding the mortgage, whether the original mortgage or any subsequently filed instrument affecting the mortgage makes reference to the party for whose benefit MERS is holding the mortgage."

MERS does not fund or service loans; it does not receive or store mortgage documents; it does not collect mortgage payments, and it does not decide on modification of loans or whether to foreclose on property. The MERS system data is not to be used by MERS members to make these decisions – they should rely on their own systems and records. As of July 22, 2011, our membership rules do not permit foreclosures to be brought in the name of MERS and they require members to assign the mortgage out of MERS' name before initiating any foreclosure actions.

How do our members execute these assignments? MERS appoints (by corporate resolution) designated officers of our member organizations, and grants them limited, prescribed authority to execute assignments and to take other such limited actions in MERS' name as signing officers. This process is not "robo-signing," and the use of signing officers fully complies with all applicable laws in Massachusetts. It is a rather common business practice.

Some have claimed that MERS makes it harder for homeowners to identify who owns their loan, but that simply is not true. The county land records were intended to announce and preserve the security interest of the creditor – and MERS registration does not change that. MERS also makes the identity of a loan's servicer available for free to homeowners. In addition, servicers and investors are required under federal laws to disclose certain changes in servicing and note ownership to borrowers.

The MERS system does not replace county registers of deeds; in fact, the MERS business model relies on the county recording system. MERS registration helps eliminate breaks in the chain of mortgage holders. Yes, the MERS model eliminates the need for assignments when transfers of ownership or servicing rights are done between our members – because these transfers are not statutory recordable events (remember, the lien has not been transferred from MERS). No business expects to earn fees for work that is not done. Moreover, the elimination of recording fees and the infrastructure costs associated with recording unnecessary intervening assignments (incurred by both lenders and counties) does lower the cost of home ownership.

Finally, it should be noted that MERS has been approved for the use in housing finance programs administered by the federal housing agencies (HUD, FHA and VA) and many state finance agencies, including the Massachusetts Housing Finance Agency.

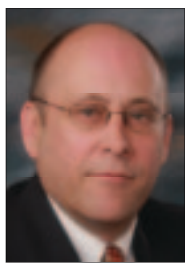
Bill Beckmann is president and CEO of MERSCORP, Inc. and Mortgage Electronic Registration Systems, Inc.

Freddie Mac relaxes short sale affidavit requirements

Addition of knowledge standard significantly reduces liability

BY RICHARD A. HOGAN

As loan delinquencies have risen over the last few years, servicers are increasingly opting to bypass the foreclosure process and liquidate properties more quickly through a short sale. Servicers do this to reduce their expenses and mitigate the high loss severity on liquidated loans. According to industry experts, the average real-estate owned properties (REOs) took 17 months to sell in the middle of 2011, compared to just under 12 months for short sales completed in that time. Servicers experienced a 70 percent loss rate on REOs sold in the middle of 2011, compared to less than 60 percent for short sales.


Rich Hogan

With the increase in short sales, housing experts agree that short sale fraud is on the rise. The typical short sale fraud scheme involves a real estate agent who will rig sales at a low price and hide better offers from the lender and the distressed homeowner. Once the short sale is consummated, the property is quickly flipped to a new buyer who has offered more money for the property. According to Freddie Mac (the Federal Loan Home Mortgage Corporation), "by concealing the higher offer, short sale fraud worsens losses to home sellers, Freddie Mac and taxpayers. It also throws another wrench into the housing recovery by undermining the trust and transparency at the core of any real estate transaction."

As a result of an increase in short sale fraud, Freddie Mac requires in loans they purchase that all of the parties involved in a short sale sign an affidavit at the closing. The purpose of the affidavit is to prevent fraud by requiring the buyer, the seller, the real estate brokers, the escrow/closing agent, and any transaction facilitator to make various certifications (including that the short sale is an arm's length transaction and that the buyer will not resell within 120 days unless there are substantial improvements). This affidavit puts increased liability on settlement agents.

There are three main issues that Freddie Mac's affidavit has posed for real estate attorneys:

- The affidavit requires an attorney to certify information that is not available to him or her, in particular whether the transaction is arm's length. The relationship between the buyer and seller may not be evident from the public record information or their identification documents.
- The affidavit places a negligent misrepresentation standard on the settlement agent. Unlike a "to the best of my knowledge" standard, a negligence standard requires the attorney to use the reasonable efforts of an ordinary person to determine whether the transaction is arm's length. Instead of laying out clearly what attorneys must do to release themselves from liability, the affidavit places the settlement agent at risk of liability if fraud is discovered after signing the affidavit.
- The affidavit requires the attorney to sign the transaction in a personal capacity as well as in a corporate capacity. Thus, if fraud is discovered, Freddie Mac or the servicer can go after the settlement agent's personal property and monies in addition to going after the business entity.

Because of these concerns, many real estate attorneys have struggled with deciding whether to sign such affidavits.

Over the last few months the National Association of Realtors® (NAR) and the American Land Title Association® (ALTA) have been meeting with officials from Freddie Mac to relay their concerns over the affidavit. On Nov. 18, 2011, at the request of the NAR and ALTA, Freddie Mac amended its policy regarding its mandatory short sale affidavits. Servicers are required to implement the changes by Jan. 1, 2012, but are encouraged to do so immediately. Each servicer covered by the policy must update its forms to comply with the revised policy.

The revisions clarify that statements made in the affidavit are made to the best of each signatory's knowledge and belief. The addition of the knowledge standard significantly reduces liability. The revisions also ensure that each signatory is liable for his or her negligent or intentional misrepresentations, but not those of other signatories to the affidavit. No signatory is responsible for the certification of any other signatory. The changes also include guidance with respect to the short sale affidavit, including the information that must be included in the affidavit. Finally, although Freddie Mac is requiring all signatories to sign one affidavit, the amended policy no longer allows the affidavit to be an addendum to the sales contract.

In addition to the changes in the affidavit, Freddie Mac has also provided additional guidance with respect to its short payoff requirements. Specifically, Freddie Mac:

- Provides that short sale negotiation fees must not be deducted from the proceeds of the sale or charged to the borrower.
- Clarifies that all amounts paid to any party in connection with the short payoff transaction, including payments made to holders of other liens on the mortgaged premises, must be accurately reflected on the HUD-1 Settlement Statement and the amount and recipient of the payments must be clearly identified.
- Allows a borrower to receive a payment upon the sale of the mortgaged premises only if the payment is offered by the servicer, approved by Freddie Mac, and reflected on the HUD-1 Settlement Statement.

While the new Freddie Mac short sale affidavit is definitely preferable to the older one it is far from perfect. Real estate attorneys are encouraged to make sure they are signing an updated form and, if presented with an old form, are well-advised to request the servicer to update or allow amendments to the form before they sign, to avoid potential liability issues. It is also very important that real estate attorneys carefully explain the affidavit to their client before the client executes the affidavit.

Rich Hogan is the Legislative and Regulatory Counsel at CATIC, New England's largest domestic and only bar-related title insurance underwriter. He is a co-chair of the Legislative Committee and is a member of the National Affairs and Title Insurance Committee. He can be reached at rhogan@caticaccess.com or (860) 257-0606.

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