Avoiding co-owner headaches in condos
PAGE 6

Comparisons of condo law in NH and MA
PAGE 7

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

REBA news
WWW.REBA.NET
THE NEWSPAPER OF THE REAL ESTATE BAR ASSOCIATION
MARCH 2012
Vol. 9, No. 2
A publication of The Warren Group

Mentoring options for new members

BY ANDREA M. MORALES

REBA offers a number of member benefits focused on the needs of new members or newly-admitted lawyers. These include the availability of REBA lawyer-staffers to respond in real time to member inquiries, as well as the REBA ethics hotline and the association's pioneering peer-to-peer mentoring program.

Members, particularly newly-admitted members, may call REBA at 617 854-7555 with practice or title questions in any area of real estate law, particularly questions relating to the application of REBA's standards and forms. In some instances, we refer member inquiries out to the appropriate REBA committee chair for an in-depth response.

Andrea Morales

The REBA ethics hotline is actually a dedicated, confidential email address, ethics@reba.net. These email inquiries, often relating to conflict concerns, are directed to the three co-chairs of the REBA ethics committee. A REBA lawyer staff member or an ethics committee co-chair will telephone in reply, for a brief discussion and suggested resolution of a member's concerns. The ethics hotline can bring peace of mind to a new or newly-minted lawyer with a thoughtful response from a seasoned real estate practitioner.

The peer-to-peer mentoring program has become a popular member benefit for the association. The program has grown in the past three years as so many recent

See MENTORING, page 11

WALK TO THE HILL

ABOVE: REBA President Chris Pitt and President-elect Mike MacClary join Massachusetts Bar Association president Dick Campbell at the 13th Annual Walk to the Hill for Civil Legal Aid. REBA, together with many other bar associations, is a sponsor of the walk.

LEFT: REBA President Chris Pitt joins Equal Justice Coalition Chair Sandy Moskowitz at the 13th Annual Walk to the Hill in support of civil legal aid in late January. Over 500 lawyers participated in the walk, one of the largest lobbying events at the State House. Moskowitz, a longtime REBA member, chairs the Equal Justice Coalition, sponsor of the annual walk.

THE REAL ESATE BAR ASSOCIATION'S
2012 SPRING CONFERENCE
BEST WESTERN ROYAL PLAZA HOTEL
181 BOSTON POST ROAD WEST, MARLBOROUGH
MONDAY, MAY 7, 2012 | 7:30 A.M. – 3 P.M.

KEYNOTE SPEAKER WILLIAM J. POORVU, HARVARD BUSINESS SCHOOL, PRESENTS "THE AMERICAN DREAM: AN INVESTMENT OR A PLACE TO LIVE?" ***FOR MORE INFORMATION, SEE PAGE 11.***

Old Republic Title requires compliance with *REBA vs. NREIS*

In a memorandum sent earlier this month from Old Republic Title's corporate legal department to multi-state agents and policy-issuing offices nationwide, Old Republic Title National Title Insurance Company instructed all its agents to follow the Supreme Judicial Court's decision in *REBA vs. National Real Estate Information Services, Inc.*, requiring not only the presence but the substantive participation of an attorney on behalf of the mortgage lender, and advising that certain services connected with real property conveyances constitute the practice of law in Massachusetts.

The memorandum concludes "… any business model proposed for Massachusetts must include a Massachusetts attorney acting as an integral and independent component of that agent's plan."

"This is another major breakthrough for REBA and Massachusetts lawyers," said Bob Moriarty, co-chair of the association's Practice of Law by Non-Lawyers Committee. "Now there are two national title insurance underwriters, Stewart and Old Republic, which have acknowledged REBA's position on witness closings and the need for substantive participation by an attorney. We are grateful for the leadership of Old Republic Title, particularly Massachusetts State Manager Sandy Schoen and State Counsel Mike Gagnon, for their initiative on this matter of crucial concern to the commonwealth's real estate practitioners.

Doug Salvesen, REBA's counsel, said: "We now look to the remaining national title insurance underwriters, particularly First American, and the Fidelity National family of underwriters (Commonwealth, Chicago, Lawyers, Ticor and Fidelity) to follow the example Old Republic and Stewart to eliminate witness or notary closings in the Commonwealth once and for all."

"The silence of Fidelity and First American is deafening," added Tom Moriarty, the other co-chair of the REBA Practice of Law by Non-Lawyers Committee.

COMMENTARY

Lessons from the Food Network

BY PAUL F. ALPHEN

Well, now that the football season has tragically ended, there is more time in the Man Cave to watch the Travel Channel and the Food Network. I especially enjoy "Restaurant Impossible," where fearless restaurateur Robert Irvine attempts to resuscitate dying restaurants and bring them back to life. I especially enjoy the direct criticism and counsel that he provides to his clients. He frequently asks the restaurateurs to describe their prior experience in the restaurant business, and he is frequently told that they have little or none. Chef Irvine pulls no punches and tells them that they had no business opening a restaurant, and asks, "Why on earth did you think you could run a restaurant?!!?"

Paul Alphen

I think many of us wish we could so blunt with some of the crazy ideas we see, some perpetrated by our clients and some we see in the periphery. I asked some of my friends to supply me with some examples, and here are a few:

Two software engineers have no more business attempting to become real estate developers in their spare time than I have writing and selling software in my spare time. Likewise, waiting for payment at the time of the sale of lots out of a new subdivision is not necessarily a good idea.

> Just because you can effectively reduce the deal to writing does not necessarily mean that the idea is still not crazy.

Certain mortgage brokers and real estate agents (God bless them all) should likewise refrain from providing complex zoning advice (especially those who tell innocent buyers that they "just need to get a variance," as if the variances grow on trees).

Sometimes when clients come up with crazy ideas on how to finance a deal, just because you can effectively reduce the deal to writing does not necessarily mean that the idea is not still crazy. Similarly, holding a second (or third) mortgage is not necessarily a safe place to be when the music stops.

When a developer claims he is selling a "fully approved" subdivision, it probably isn't.

If a seller prohibits a buyer from meeting with local officials as part of a purchase and sale due diligence process, the buyer should walk away from the deal.

When your goofy marginally-employed buddy from high school was in the process of buying a new, 4,000-square-foot home, somebody should have said: "Wait a minute!" You should have the same reaction to the wise-guy bragging about the no-income verification mortgage he recently obtained.

Individuals and businesses need to give more thought into picking their bankers. When the bottom fell out, did you find that your commercial clients were treated better by community banks or nation-wide banks?

When times are good, it may be better to take the bird in the hand, rather than wait for two in the bush. Attempting to squeeze the last penny out of a deal could potentially push the deal into leaner times.

In these days of lean resources, why must you drive to a "trial" assignment session in the Superior Court, when the Land Court can accomplish the same thing on the phone?

Why does it cost more to record certain documents than it does to draft them?

Why are there so many hard and fast time limits associated with relatively simple cases, but you can end up waiting 18 months for a simple decision?

Always recommend an owner's policy of title insurance.

Always get a retainer.

REBA's president in 2008, Paul Alphen currently chairs the association's long-term planning committee. A frequent contributor to 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. Paul can be reached at paul@lawbas.com.

COMMENTARY

Enforced access doesn't make good neighbors

BY BRUCE J. EMBRY

Imagine if Massachusetts law required that every seller in a real estate transaction (or landlord) was required to accept any prospective buyer (or renter) as long as they could demonstrate that they could meet the financial obligation of the arrangement. Although owners could still sell or rent to the highest bidder, they would have no discretion to factor in any other criteria in deciding whether to sell or rent. It would mean that owners could not take into account the impact a buyer might have on a neighborhood. It would mean that large commercial buildings would have to lease to any prospective tenant; that landlords of residential apartment buildings would never be able to turn down a prospective renter – even if they were a Level III sex offender, a convicted drug dealer or anyone who might adversely impact other tenants or the property. What would the real estate market in Massachusetts look like if this was the law in the commonwealth?

Unfortunately, this is not a hypothetical question. Bills pending in the Massachusetts legislature would take Massachusetts down this path. S593, S627 and H2790, currently under consideration by the Joint Committee on Housing, would eliminate the ability of housing cooperatives in Massachusetts to reject prospective shareholders for any reason as long as they met the financial obligations for entry.

The bills were introduced at the request of one individual, who believed that he had been unfairly denied admission into a housing cooperative, even though he met all of the cooperative's financial standards. But beyond the complaint of this one person there is no evidence in the public record that there has been any abuse by the cooperative housing system that needs systemic correction. In fact, it is hard to find individuals who have been rejected from a housing cooperative, let alone those who feel that they were rejected unfairly. That might explain why no members of the public testified in support of the bills during a public hearing devoted to the issue. Regrettably, the absence of public support or interest didn't stop the legislative sponsors of the bills from portraying existing housing cooperatives as discriminatory institutions where rejection of prospective shareholders is "arbitrary, capricious and frequent," without any evidence that these conditions actually exist.

Cooperative housing corporations comprise a small portion of Massachusetts' housing stock, and include apartment and limited-equity housing, artist communities, senior housing and other forms of focused living that are intentionally designed to create diversity and affordability in today's housing market. Unlike condominiums with individual ownership of units and shared ownership of common areas, members of a housing cooperative do not own their units but rather own shares of the entire housing corporation and lease their apartment from the corporation. Consequently, cooperative boards use a multi-faceted assessment process for the screening of candidates for membership, just as any property owner or private corporation would if entering into a co-ownership or tenancy agreement. An applicant who might meet financial requirements but who does not share the same goals or ability to comply with the cooperative's living expectations (as in the case of artist cooperatives) should be subject to the cooperative's screening. The pending bills would eliminate the very aspect of cooperatives that make them unique and valuable to their shareholders: the ability to preserve the cooperative nature of their communities.

Of course, housing cooperatives must follow the same fair housing laws as all other forms of housing and are prohibited from denying sale of their cooperative shares to an applicant on the basis of race, color, national origin, religion, sex, familial status, or handicap. However, like all forms of housing, cooperatives can select not to sell to students, sex offenders, or those with poor reports from prior landlords or neighbors, and the like.

These bills are not only a threat to cooperative owners, but to all property owners in Massachusetts who may wish to rent their properties. It's only a small step to putting the same restrictions on all landlords of any form of rental property. Realistically, is there any difference between the subjective judgment of a cooperative board and the management company of a large scale property owner, or the owner-occupant of a multi-family home? This legislation is unwarranted, unnecessary and unfair. REBA and its members should not support these bills.

Bruce Embry is a partner at Clark, Hunt, Ahern & Embry. He can be reached at bembry@chelaw.com.

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

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

President:
Christopher S. Pitt
cpitt@rc.com

President-Elect:
Michael D. MacClary
mmacclary@burnslev.com

Immediate Past President:
Edward M. Bloom
embloom@sherin.com

Clerk:
Christopher L. Plunkett
clp@clplunkett.com

Treasurer:
Michelle T. Simons
msimons@legalpro.com

Executive Director, Editor:
Peter Wittenborg
wittenborg@reba.net

Legislative Counsel:
Edward J. Smith
ejs@ejsmithrelaw.com

Managing Editor:
Nicole Cunningham
cunningham@reba.net

Assistant Editor:
Andrea M. Morales
morales@reba.net

MISSION STATEMENT

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

MENTORING STATEMENT

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

Standard bulk postage paid at Boston MA, 02205. Postmaster: Send address changes to REBA, 50 Congress St., Boston MA, 02109

THE WARREN GROUP Since 1872
Real Estate & Financial Information

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

EDITORIAL | ADVERTISING | PRODUCTION

COMMENTARY

Sitting on a volcano

Awaiting the SJC's *Eaton* foreclosure decision

BY EDWARD M. BLOOM

As Tolkien's classic trilogy "The Lord of the Rings" draws to a close, Frodo stands at the lip of Mt. Doom to throw the powerful ring into the volcano and thus destroy it. As the ring sinks into the lava, the volcano erupts, threatening the lives of Frodo and his companion.

Like the brave little hobbit, the real estate industry, including homeowners, mortgage lenders and the real estate bar, sits anxiously on a volcano entitled *Eaton v. FNMA*, currently pending before the SJC. If the SJC decides to uphold the Superior Court holding in this case and the decision is applied retroactively, the volcano will erupt and the effect on Massachusetts real estate titles will be incalculable.

Ed Bloom

Although there is no Massachusetts law to support the Superior Court judge's ruling in *Eaton*, she held that a mortgage foreclosure was invalid because the foreclosing mortgagee did not possess the promissory note at the time of the foreclosure. While conceding that Massachusetts common law has recognized that the note and mortgage can be separately assigned, she concluded that the two instruments must be re-united in order to effectively foreclose the mortgage. She relied on two cases from the 1850s and a case from 1917, which all prevented a mortgage holder from foreclosing because the note in each instance, which was held by a separate individual, had been paid. These cases, rather than standing for the proposition that the holder of a mortgage must also possess the note in order to foreclose, instead reflect a rule that once the debt secured by a mortgage has been paid in full, the mortgage holder may not foreclose its mortgage because no debt is owed.

Should the SJC uphold the lower court's ruling and, as in its *Ibanez* decision, conclude that its holding applies retroactively, every real estate title in Massachusetts that has a foreclosure in its back title will become unmarketable, because there is no way for anyone examining record title to determine if a foreclosing mortgagee possessed the note at the time of foreclosure.

Massachusetts law does require that assignments of mortgages be recorded, but there is no such requirement regarding the transfer of notes. In fact, in today's modern lending environment with a secondary mortgage market, securitized loans and the Mortgage Electronics Registration System (MERS), it is almost impossible to determine from an examination of title to a specific property who holds the note.

See BLOOM, page 10

COMMENTARY

Foreclosures a challenge for conveyancers

BY JOEL A. STEIN

Changes in foreclosure law and practice have provided a challenge for conveyancers since at least the time of passage of the Soldiers and Sailors' Civil Relief Act in 1940 (subsequently renamed the Servicemembers Civil Relief Act as part of its revision in December 2003).

In my 35 years as a conveyancer, I have seen statutory changes in 1975 and 1981, which changes impacted the parties entitled to notice pursuant M.G.L. c. 244, §14; the Foreclosure Moratorium Act of 1991; an amendment, also in 1991, which eliminated the requirement to list junior lienholders on the order of notice and eliminated the post-sale judicial approval process; and amendments in 1990 and 1998 for record owners required to notice under the Servicemembers Civil Relief Act.

Joel Stein

However, even the most experienced conveyancer must be startled by the events of the past two years as we have been confronted by issues including robo signing, *U.S. Bank National Association, as Trustee v. Ibanez*, *Bevilacqua v. Rodriguez*, *Henrietta Eaton v. Federal National Mortgage Association and Another*, *Oratai Culhane v. Aurora Loan Services of Nebraska*, and the suit filed by the Commonwealth of Massachusetts against Bank of America, N.A. and others including Mortgage Electronic Registration Systems, Inc. and MERS Corp., Inc.

ROBO SIGNING

Robo signing is a practice of a bank employee signing thousands of documents and affidavits without verifying the information contained in them. It was originally reported in October 2010 when it was divulged that employees for several major U.S. lenders were signing thousands of documents a month without verifying their accuracy. In addition, the instruments were executed outside the presence of a notary. In many instances, signatures of the same notary appeared in different handwriting from instrument to instrument.

Despite reports in several media outlets that robo signing continues, the recent settlement between the Obama administration, 49 state attorneys general and five large mortgage servicers appear to put the issue at rest for the moment. In Massachusetts, at least one registry of deeds, the Essex South District Registry of Deeds, continues to review documents for "robo signers." These may include documents such as discharges and assignments. If an instrument is deemed to be "robo signed," it will be rejected for recording and an attorney can either execute an affidavit as

See STEIN, page 11

COMMENTARY

Pending and proposed foreclosure legislation reviewed

BY EDWARD J. SMITH

An important benchmark in the legislative cycle looms as the several joint standing committees of the Massachusetts General Court are obliged by the Joint Rules of the House and Senate to report – by March 21, 2012 – on thousands of measures that have been pending since January 2011. REBA members, in particular the REBA Legislation Committee, have been studying scores of bills that were filed in the wake of the mortgage foreclosure crisis in Massachusetts.

Some measures propose additional burdens on lenders to work with borrowers on loan modifications in order to keep borrowers in their homes. Others engage the debate that followed decisions by the Supreme Judicial Court in *Ibanez* and *Bevilacqua*, which rendered void numerous post-foreclosure titles. Other legislative bills propose mandatory pre-foreclosure mediation and even pre-foreclosure judicial review. Longstanding assumptions about the recording system and the appropriate role of MERS have been questioned, and varied opinions expressed in litigation and legislation. A veritable free-for-all has ensued.

Hearings by the Legislature's Joint Committee on Financial Services and the Joint Committee on the Judiciary, in particular, attracted a great deal of heat, and even some light! Now that these hearings are concluded, committee members and staff must sort out matters before them and make judgments in an area in which past efforts have not been as successful as hoped. Prior omnibus legislation (St. 2007, cc. 206, 223, 224; St. 2010, c.258) does not seem to have changed the landscape in any meaningful way. Caution seems to be the *modus operandi* right now.


Ed Smith

One measure that has attracted support has been proposed by Attorney General Martha Coakley: S.868, H.1219, "legislation to prevent unlawful and unnecessary foreclosures," would require the lender to offer an affordable loan modification when it is shown that under a net-present-value test, a loan modification is more profitable than foreclosure. Coakley told legislators that servicers have not lived up to their promises in negotiating loan modifications, and that her office's only successes have been achieved through enforcement actions (e.g. Option One, Goldman Sachs and Fremont). In limiting her legislation to loans with certain "high-risk features," she said that is based on the SJC's specific finding that lenders with those products are liable for unfair and deceptive practices under c.93A, because they "should have known that borrowers could not handle such loans." As for the "net-present-value/commercially-reasonable" analysis, for a property having a reduction in value, it is her office's view that so long as the borrower's reduction in present income "correlates to" the reduction in property value, their analysis model should result in a successful modification. (Lenders countered that the vast majority of borrowers re-default after a loan modification.)

Secretary of State William Galvin proposed H.2854, which would require that prior to a foreclosure action under M.G.L. c.244, the lender must obtain a pre-conditional judgment order from the housing court, or district court under a new M.G.L. c.239A. An eligible borrower (certain unemployed or unemployed persons, as defined) could seek protection from foreclosure through a restructuring of the mortgage loan, for a restructuring period not to exceed six months. The borrower would pay to the lender during the restructuring period an amount not to exceed 25 percent of his net income per month, including any unemployment benefit. The amount of the mortgage debt at the end of any period of restructuring would in no event exceed either the amount of the original mortgage debt or 90 percent of the fair market value of the property, whichever is greater. If, for a period of three months following the end of the restructuring period, there are no further proceedings to continue the foreclosure proceedings based upon a default on the mortgage as restructured, the foreclosure action would be dismissed.

If the borrower is not eligible for restructuring, or he/she re-defaults, the foreclosing lender must file an affidavit proving that the lender is the mortgage holder; that the mortgage was legally "issued," and that the homeowner is in default. The borrower may request a hearing, at which "all parties in interest" shall have the opportunity to present evidence to prove or disprove the truthfulness of the mortgagee's affidavit. Finally, the lender must obtain a conditional judgment under M.G.L. c.244 as part of the foreclosure process.

Members of the Massachusetts Alliance Against Predatory Lending, citing a spike in foreclosure auctions in November and December, pressed for bills, variously, requiring banks to participate in mandatory mediation before foreclosing on homeowners, enabling former homeowners to pay rent and live in foreclosed properties, and requiring judicial review to give borrowers court recourse prior to foreclosure.

Members of REBA, including 2012 president Chris Pitt, pushed back, contending that the Massachusetts court system is already overburdened – the victim of repeated budget cuts and increased caseloads – and that adding foreclosure cases to dockets would be overwhelming. Pitt said that the Land Court processed 30,000 cases in 2010. If the court were required "to hold a mandatory judicial proceeding as a precondition to every mortgage foreclosure," he said, the backlog would "overwhelm the court's ability to handle these cases in a timeframe that is acceptable to anybody. There are not the resources on any level of the trial court to handle that."

Massachusetts Bankers Association representatives urged lawmakers to proceed cautiously, noting that recent Federal Reserve statistics showed that states with judicial foreclosure processes showed "no statistical difference for homeowners than non-judicial states." They argued that efforts by banks to engage delinquent homeowners and modify mortgages have "proven onerous and unsuccessful, and that existing foreclosure proceedings take about a year." Requiring judicial review, they said, would delay the process another three to six months.

Legislation Committee co-chair Erica Bigelow testified for REBA to support, in principle, S.830, legislation to clear titles after certain defective foreclosures. Decisions in *Ibanez* and *Bevilacqua* have made it clear that such titles were void. The burden and expense of re-foreclosing, said Bigelow, was untenable for arms-length buyers who purchased after a foreclosure. S.830 proposes a period of time after a mortgage foreclosure, e.g. 90 days from the recording of the affidavit of sale, for a foreclosed debtor to challenge the foreclosure sale in court after a bona fide third party has purchased. The legislation does not change existing foreclosure procedure. Importantly, it does not prohibit a challenge to the foreclosure sale after the 90-day period so long as the foreclosing lender or a related party still remains in title.

REBA will continue to engage legislators and other officials on these issues. Under the Rules of the House and Senate formal sessions will end this year on July 31.

A practicing real estate lawyer, Ed Smith has served as legislative counsel to the association for more than 20 years. He can be reached at ejs@jsmithrelaw.com.

COMMENTARY

Condo owners pay millions in unnecessary coverage

BY NEIL D. GOLDEN

You may have noticed in recent condominium mortgage transactions something called an HO-6: a requirement from the lender that the borrower obtain and pay for a unit owner's policy to cover the entire interior value of the unit. What changed? Nothing, really. In fact, FNMA (note: I will refer to FNMA exclusively in this article, as FHA and FHLMC have almost identical insurance requirements) actually thought that it was liberalizing its insurance requirements. What it created instead was a mess which is costing home owners collectively millions of dollars in wasted premiums.

FNMA first started to approve condominium projects in Massachusetts around 1980. I represented the first developer in Massachusetts to submit a project to FNMA for approval and I had the "distinction" (or, as I prefer to think of it, great misfortune) of having to draft FNMA compliant documents from scratch. Someone had to do it. All the federal agencies have had a fairly consistent set of insurance guidelines which have varied very little over the years. You can find FNMA insurance requirements in Part B Subpart 7 Chapter 3 of its selling guidelines. In brief, a summary of the requirements are as follows:

Neil Golden

The project must be insured at 100 percent of the insurable replacement cost of the improvements. Preferably, and if available, there should be a guaranteed replacement cost endorsement. The difference being that with the guaranteed endorsement, the insurer is on the hook regardless of the cost to restore the property while a simple replacement cost policy limits the coverage to the amount of insurance. The result is, with a simple replacement cost policy, that even though a condominium may have attempted through their insurance agent to insure at full replacement cost, if it turns out they guessed wrong there will not be sufficient insurance proceeds to restore the building.

The deductible may be no higher than 5 percent of the face of the amount of the policy. Bear in mind that the agencies now require the amount of the deductible to be included in the budget. If the trustees believe they are saving money with a higher deductible this will in fact be offset by the requirement of setting aside cash for the full amount of the deductible.

Special endorsements:

- Inflation guard endorsement (self explanatory), if available.
- Building ordinance or law endorsements. This covers losses due to the operation of building laws regarding, demolition costs, and increased costs of construction due to new building laws which were not in effect when the building was originally constructed
- Steam boiler and machinery coverage endorsement when the building has central heating or cooling. This is a liability endorsement for accidents. Coverage must be in the amount of the lesser of $2 million or the insurable value of the building.
- Liability coverage.

Other requirements include:

- A requirement that the policy recognize the condominium association as trustee, i.e., the entity to receive and manage insurance proceeds.
- A waiver of subrogation against unit owners, so that if an individual owner is responsible for the casualty the carrier cannot recover against that unit owner.
- Fidelity insurance ,which is distinct from officers and directors liability coverage, which protects trustees in case they are sued for negligence or omission. Curiously, while officers and directors liability coverage is very important, it is not required by the agencies. Earthquake and terrorism insurance are also not required.
- Finally, the insurance must be primary, meaning that even if a unit owner has other insurance that covers the same loss, the master carrier must pay.

FNMA has always – *always* – required the interior of units (i.e., all part of the unit which would be considered real estate including cabinets, bathroom fixtures, light fixtures, finished flooring and other built-ins) to be insured. Up until 2007 the master policy had to cover these items. FNMA, bowing to pressure from states that do not allow for, or actually prevent, projects to have this type of coverage changed course and began to allow for "bare walls" coverage in the master policy as long as there was "walls in coverage" in each owner's HO-6 policy in the minimum amount of 20 percent of the value of the unit. (See FNMA Announcement 07-18, dated Nov. 15, 2007.) A word of warning here: "walls in coverage" and "bare walls " coverage are not recognized in the insurance industry and really have no legal meaning.

It has been my experience that it had been rare for any lender to turn down a loan based on whether a policy was "walls in" or, for that matter, to turn down a loan for any other insurance coverage issue before 2007. But from 2007 onward, FNMA was telling lenders that they had to determine whether the master policy was "walls in" or not. This required the lenders to both read and understand the insurance provisions in the condominium bylaws, which they did not have the expertise to do.

There are various broad alternatives that the insurance bylaws can require for interior unit coverage, and master policies are generally written so that the building definition in the policy references the coverage required in the bylaws. The most inclusive is unequivocal language that all interior portions of the unit are to be insured in the master policy. The opposite extreme would be only common elements are insured and no part of the unit is insured. Hybrids would include either coverage for those parts of the unit that the developer constructed at the creation of the condominium or a second hybrid which would cover the replacement of original specifications but no new improvements. I believe that these hybrids should be avoided, as when the condominium matures it becomes difficult to know what was originally built and what was a subsequent improvement.

See GOLDEN, page 10

CONDOS

When joint ventures go bad

BY SAUL J. FELDMAN
AND HENRIETTA D. FELDMAN

When a group of people co-own their homes, in the case of condominiums, the opportunities for stress and struggle are legion. But with a little foresight and tightly drafted documents, some of the most common issues can be avoided.

A small condominium (two to five units) is really a joint venture among the unit owners. The condominium documents of this "joint venture" should be made as simple as possible, though it is important that the documents are comprehensive enough to meet the requirements of Chapter 183A, the Massachusetts Condominium Statute.

There are some people who do not belong in a condominium because they cannot handle making decisions and compromises with other people regarding their home. With a little luck, these people will not buy a condominium unit. If they do, you should expect trouble, because even the best drafted documents will not solve all of the problems resulting from people who will be unwilling to compromise on issues regarding their home.

In Massachusetts, the condominium association will usually be in the form of a trust which will include by-laws and rules and regulations. In a small condominium, it is common that each unit owner serves as a trustee, although many unit owners do not want the responsibilities inherent in serving as a trustee. Most small condominiums are self-managed. Therefore the unit owner-trustees have to assume the responsibilities that would be performed by a management company in a larger condominium. In our experience, compensation for trustees leads to conflicts and generally is not a good idea.

The by-laws should provide a mechanism to settle disputes. We would recommend mediation and arbitration, which is available through REBA.

There are many dysfunctional small condominiums in Massachusetts. In many cases, trustees have not been elected, repairs have not been made, and unit owners are not paying the condominium fees.

Regarding collections in a two-unit condominium, the condominium trust should give one trustee the power to sue the delinquent unit owner who fails to pay after 60 days' notice from the trustee of the other unit.

Regarding decision-making, some decisions should require a 100-percent vote of the trustees/unit owners. Other decisions should require a super majority, such as 75 percent in interest of the unit owners. The alternative, which some lawyers favor, is that decisions should – with a few exceptions – only require a 51-percent vote. The documents should not favor the initial owner because he will not be able to sell the other unit(s) if the documents are onerous to owners of the remaining unit(s).

Ideally, the units should be kept as separate as possible. Townhouse units therefore often work better than flats. For example, yard areas should be exclusive use areas if that is what the unit owners want.

The condominium documents should be drafted carefully, even as to standard items such as the heating system. The heating system should be described in the master deed, including whether there is a common boiler and who is responsible for maintenance. Also, balconies, patios, roof decks and other exclusive use areas need to be carefully covered in the master deed.

The master deed should provide that in the event of a conflict between the master deed and the plans, the plans will control. This helps to overcome errors by the attorney who drafted the master deed such as incorrectly describing the boundaries of the units, the common areas or the limited common areas.


Henrietta Feldman

The boundaries of the units must be described in detail. The common areas and the limited common areas also must be described in detail.

The obligations of the unit owners to maintain the units must carefully drafted. The obligations of the trustees to maintain the common areas also must be carefully drafted.

As to the limited common areas, sometimes the unit owner is responsible for maintenance, repairs, and replacements. Sometimes the trustees are responsible. In any event, the documents have to be clear and consistent on these matters.

The master insurance policy should be an "all-in" policy and cover the units as well as the common areas. Each unit owner should get his own insurance as well, covering the contents of the unit and for liability within the unit. The responsibility for the deductible has to be covered in the condominium trust.

Problems such as budgets, tenants, noise, smoking, collections, parking, storage in common areas and pets have to be carefully addressed. The rules and regulations should be as simple as possible, and they cannot discriminate against children.

The documents for a small condominium must not favor the person living there. Given the weak market, the documents have to be even-handed in order to get buyers. Therefore, giving the owner of 60 percent in effect a veto by requiring a 51 percent vote is not advisable.

Smaller condominiums are usually self-managed. A management company often is a buffer among unit owners. Being self-managed deprives a smaller condominium of this buffer.

Desperate times require aggressive solutions. Given the number of dysfunctional condominiums, we provide that the trust can bring a summary process action against a tenant of a unit owner who is not paying.

While better condominium documents will not solve all problems, an amendment or a restatement of the condominium documents can certainly correct some of the problems.

Saul J. Feldman and Henrietta D. Feldman are real estate attorneys at Feldman & Feldman, P.C. in Boston. They often serve as condominium counsel for complex condominium developments such as The Clarendon, a 33-story mixed-use condominium at 400 Stuart Street in Boston. They can be contacted at mail@feldmanrelaw.com.

LAW

Condominium practice in NH and MA: what's the difference?

BY DAVID K. MOYNIHAN

It's hard to think of two bordering states with more contrasts than Massachusetts and New Hampshire, although Utah and Nevada come to mind. While we regard Massachusetts as being more likely to regulate trade and commerce than New Hampshire, it is New Hampshire that provides an extensive regulatory review and registration requirement for any residential condominium development containing more than 10 units. Massachusetts has no corollary requirement.

This article will provide an overview of the New Hampshire registration process for a residential condominium containing more than 10 units.

NEW HAMPSHIRE CONDOMINIUM ACT

The New Hampshire Condominium Act, RSA 356-B (the NH Act), sets forth the requirements for creating a condominium. Significantly different from the Massachusetts condominium act is the requirement that a developer (or declarant) proposing a residential condominium of more than 10 units (including phasing rights) obtain a certificate of registration from the consumer protection and antitrust bureau of the New Hampshire Department of Justice. No registration is required for commercial, industrial or any other condominium where only nonresidential units are proposed.


David Moynihan

The bureau's primary purpose is to ensure that all municipal/governmental approvals are in place; the declarant provides adequate consumer protection disclosures; the declarant has the financial capability to complete the project, and that violations of the NH Act are prevented. The bureau has enacted Condominium Rules at Chapter 1400 of the New Hampshire Administrative Code that more fully describe the documents to be filed with any application where registration is required.

OBTAINING A CERTIFICATE OF REGISTRATION FOR MORE THAN 10 RESIDENTIAL UNITS

An application for registration must be filed with the bureau for any residential condominium containing more than 10 units. Since there are several form applications, one should have a thorough understanding of the NH Act and the rules before filing an application. For example, there are both a comprehensive application and an abbreviated application depending on the number of units. The form applications are available on the bureau's website.

WHAT MUST BE FILED WITH AN APPLICATION FOR REGISTRATION?

Along with a completed application and payment of the filing fee (currently $30 per unit with a minimum $200 and maximum of $2,000), the rules require at least the following documents:

- The irrevocable appointment of the attorney general to receive service of process
- The principal's background statement which requires at least the disclosure of past condominium projects, list of other projects in any state where the declarant has filed for registration or where registration was rejected, list of lawsuits involving the declarant or a principal
- The names of every shareholder, partner, member of any closely-held entity, and the principal's tax returns
- Draft condominium documents
- Draft public offering statement
- Draft purchase and sale agreement with identification of escrow agent
- Draft proposed deed
- Draft marketing or promotional materials
- Draft management agreement
- Financing commitment or other evidence of financial ability to complete the project
- Statement of the title to the property and encumbrances.

HOW LONG IS THE REGISTRATION PROCESS?

The registration process may take upwards of 70 days. Statutorily, the bureau has 10 days from the date an application is filed to determine if the application is deemed complete. Thereafter, the bureau has an additional 60 days to act on the application. During the 60 day period, the bureau may issue a notice of deficiency requesting additional information or an expanded disclosure. A notice of deficiency may further delay the issuance of a certificate of registration beyond the 60 day period. More importantly, the declarant's failure to address the notice of deficiency within 15 days of receipt may result in rejection of the application.

SELLING UNITS BEFORE REGISTRATION

Prior to registration, only non-binding reservations on forms provided to the bureau may be used. Additionally, all promotional materials disseminated prior to registration must contain a form disclosure stating that the condominium has not yet been registered by the bureau. Violations may result in fines or rejection of the application.

Upon favorable action by the bureau, a certificate of registration is issued to the declarant confirming the number of residential units registered. The certificate is then recorded along with the condominium documents and a copy as recorded must be submitted to the bureau.

It is important to note that the bureau maintains jurisdiction over the declarant until all of the improvements have been completed and all of the units have been sold. A declarant is required to file annual reports with the bureau stating any material change in information from the original application and any change in ownership. Change in ownership also triggers a new registration obligation.

The foregoing provides only a basic overview of the registration of a residential condominium in New Hampshire containing more than 10 units. In contrast, Massachusetts currently has no registration process and units may be conveyed as soon as the condominium documents are recorded, assuming it is not a conversion condominium.

While the extensive and costly New Hampshire registration process provides consumer protections, it appears that few clients take the time to read the condominium offering documents. Often a purchaser's motive to buy is driven by the unit's location, price and curb appeal, not the adequacy of condominium offering documents. Some purchasers mistakenly assume that a certificate of registration means the unit is a good investment, clearly an unintended result. In the end, consumer protection disclosures should never replace the old adage, "Buyer beware."

Admitted to practice in both New Hampshire and Massachusetts, David Moynihan is an active member of REBA's condominium law and practice committee. He is of counsel to the Woburn office of the regional law firm of McLane, Graf, Raulerson & Middleton, P.A. and has participated in programs for MCLE (Massachusetts Continuing Legal Education, Inc.). David can be contacted at david.moynihan@mclane.com.

FILE RETENTION

Proper disposal of non-trust property: convert or destroy?

BY HENRY J. DANE

In July, we outlined the ethical considerations relating to the preservation and disposition of attorneys' files. In his 2001 article entitled "Talking Trash – Recycled," Daniel C. Crane, then bar counsel, extracted from the Rules of Professional Conduct 1.15 (Trust Property) and 1.16 (Declining or Terminating Representation) some basic principles to guide attorneys on the subject. Consistent with Rule 1.15 and 1.16(d) and (e), he characterized the material in the possession of an attorney in terms of property rights. There is not much doubt about trust property for which Rule 1.15 imposes a clear fiduciary responsibility. Trust property consists of things like bank accounts, money, securities and things of unique or intrinsic value which may have been entrusted to the attorney. On these, there is little ambiguity: such property belongs exclusively to the client and must not be comingled with property belonging to the attorney.

However, the definition of trust property expressly excludes "documents or other property received by a lawyer as investigatory material or potential evidence." It is this non-trust property which typically clogs our file rooms, warehouses, vaults and mountain caverns. It is the papers, the research notes, the drafts, the briefs, the pleadings, the closing packages, the correspondence, the printed emails, the inter-office memos, the transcripts, the title abstracts, the doodles and the scribbles that constitute the piles of paper filed away at the conclusion of an engagement, which, with rare exception, quickly become useless (and forgotten). And, with the passage of time, they become no less useless or burdensome. They do not shrink, wither, rot or decompose. They just sit there and take up space.

Based on a review of the files at my firm, in a year's time, each attorney creates about 30 linear feet of files. Expressed in terms of standard lateral filing cabinets, this amounts to nearly two five-drawer cabinets (per attorney, per year). Each such file cabinet requires 13 square feet of floor space, and, if you are paying $25 a foot for rent, those files cost you $325 a year just to sit there. If you retain files for seven years, the annual rental cost for seven years worth of those files is $2,275. You may have to double or triple that figure if your practice consists of high volume conveyancing or any significant amount of litigation.

It is not just a matter of cost, it is also a matter of clutter and efficiency. If you only keep the things you are required to keep or which you have reason to believe you will need in the future, it is easier to find what you need when you need it.

Rule 1:16(d) and (e) are quite specific that "upon termination of representation" a lawyer must surrender papers and property to which the client is entitled, and must make available to a former client "within a reasonable time" the contents of his file (although he may retain copies "at his own expense"). We have expressed our opinion that the "best practice" is to a) have a records retention policy and b) inform your clients of this policy either in your engagement letter or in a letter which might be routinely sent to clients at the termination of an engagement (See "File Retention Policies," *REBA News*, July 2011)

However, many attorneys, perhaps through inattention or fear of unforeseen consequences, have files that go back five, 10, 15 or more years; and at the time the work was undertaken, their offices may have been less cluttered or they didn't have the foresight to follow the recommendations of Messrs Crane and Ronayne. For those in such circumstances, there appear to be but three legitimate options: a) do nothing, and retain the files indefinitely; b) notify the client that you will ship him his file if he so requests, and if not, it will be destroyed after the passage of a certain period of time; or c) use a reliable and secure means to convert the file to electronic format.

Even if you are willing to live with the practical difficulties of option A, you have not escaped all ethical issues, since you need to consider what happens to your pyramid of paper when you die or retire, or if your firm breaks up, closes shop or goes bankrupt. With regard to option B, our suggestion is that you adopt a file disposition/destruction schedule, you notify the clients that you will, at their request, ship them their file (Mr. Crane believes that the attorney has the right to bill the client for shipping costs, at least when the volumes are large or the destinations are remote. The sample return/destroy letter in Appendix 10 of *The Lawyers Guide to Records Management and Retention*, published by the Law Practice Management Section of the ABA (2006) contains a provision that the attorney may bill the client for the cost of handling and shipping, although this may not be the law in Massachusetts. Rule 1.16 refers to the instances in which copying charges are permissible, but is silent on "shipping and handling.") The guide is available from the ABA, and contains a number of sample documents, including the notice letter just referred to. The guide advises that "[o]nly after reasonable and well-documented efforts to locate the client and obtain permission to destroy a file can the firm proceed with disposition and, even then, the disposition must be done in a way that preserves confidentiality." However, in Massachusetts, file destruction may not be an option if the former client cannot be found and notified, or if the attorney's file retention policy has not been clearly stated in an engagement or termination letter, and that letter contains a clear statement of the circumstances under which the file may be destroyed.

Of course, the older the file, the more

See DANE, page 9

NEUTRALITY

When your client asks you to be an escrow agent

BY ROBERT T. GILL
AND JENNIFER L. MARKOWSKI

Nearly every real estate transaction needs an escrow agent who, by definition, neutrally administers her responsibilities. Before accepting the role, an attorney should consider that as escrow agent she could find herself in a dispute between her client and the other party over who is entitled to the escrow funds. As such, the attorney should fully advise her client of the consequent limitations on the representation insofar as the handling of escrow funds is concerned.

Bob Gill

If, after proper disclosure, the client consents to the attorney serving as escrow agent, the attorney should reduce the disclosure and client consent to writing and prepare an escrow agreement which describes the escrow agent's obligations, the conditions under which disbursements will be made, and the procedure for resolving disputes (including who will pay the associated costs).

THE ESCROW AGENT'S DUTIES

An escrow agreement consists of the delivery of money by one party and a promise by the other to hold it until the performance of a condition or the happening of a certain event. The escrow agreement, which need not be in writing, binds the escrow agent to follow the principals' instructions.

In a real estate transaction, the escrow agent owes fiduciary duties to both the buyer and the seller. Those duties attach upon receipt of the funds to be held in escrow, and exist as long as the funds remain, undisturbed, in the escrow agent's account. The deposit of the escrow funds constitutes an acceptance of the escrow arrangement.

When something goes awry in a real estate transaction, the proper disposition of the escrow funds is often disputed with both the buyer and seller demanding them. The escrow agent has an obligation to maintain neutrality and ensure the funds are disbursed in accordance with the principals' original instructions, i.e., the escrow agreement. See *Greater Boston Real Estate Bd. v. Board of Registration of Real Estate Brokers & Salesman*, 405 Mass. 360, 362 n. 5 (1989), wherein the escrow agent "is bound to act in strict compliance with the terms of the escrow agreement." See also *Zang*, 77 Mass. App. Ct. 672 – if escrow agent "did not think it could respect the parties' instructions for the escrow, it should have declined to hold the funds."

Jennifer Markowski

Where a dispute has arisen, the escrow agent should not disburse to either party and should pursue corrective action such as an interpleader action pursuant to Mass. R. Civ. P. 22, 365 Mass. 767 (1974). The purpose of interpleader is to sort out the amounts and priorities of competing claims to a fund. Even though the escrow agent is not advocating for one party or the other, the resolution of the dispute will inevitably require the escrow agent to expend both time and money.

DISCLOSURE OF THE DUAL ROLES OF ATTORNEY AND ESCROW AGENT

"[O]ne party's counsel may act as an escrow holder so long as the parties agree that in this capacity counsel is to serve not as the agent of either of the parties, but as a fiduciary of both of them." *David v. Town of Webster*, 76 Mass. App. Ct. 1107 (2010) (unpublished opinion), quoting *Mercurius Inv. Holding, Ltd. v. Aranha*, 247 F.3d 328, 331 (1st Cir. 2001). Because the attorney's role as escrow agent prohibits her from advocating on behalf of her client relative to the disbursal of funds, before accepting escrow responsibilities, an attorney should advise the client in detail as to the scope of her role as escrow agent and the potential limitation on her representation of the client. She should also advise the client that she can best and most fully serve the client's interests if a third-party is selected as an escrow agent. If, with a full understanding of the limitation, the client still wants the attorney to serve as escrow agent, the attorney should reduce the disclosure to a writing which is acknowledged by the client so, if a dispute arises, there is no question proper consent was given.

MEMORIALIZING THE TERMS OF THE ESCROW AGREEMENT

If, after full disclosure, the client waives the conflict and the attorney accepts the role, the attorney should draft an escrow agreement that explains the escrow agent's role and obligations as well as the conditions upon which the funds are to be disbursed.

For example, is written permission from both parties required before disbursing the funds? Further, the agreement should address how the escrow agent should proceed if a dispute arises between the buyer and the seller. Will the parties mediate, arbitrate, file a court action or some combination thereof? Who will pay the escrow agent's reasonable legal fees and costs associated with such a proceeding? Will it be paid out of the escrow funds? Will they be paid by the losing party? How will a reasonableness determination be made? REBA's Standard Form No. 33 is a helpful resource for determining how to address these issues in a written escrow agreement.

If an attorney is going to serve as escrow agent, it is worth the initial investment of time to develop good working forms that can be adapted to various transactions. Reducing the conflict disclosures and consent and escrow agreement to explicit writings provides guidance to everyone involved in the transaction and prevents unnecessary ambiguities from arising when a disagreement develops.

So, the next time you agree to hold the escrow funds, explain the role and its obligations and consequent limitations and do it in writing.

Bob Gill and Jennifer Markowski are partners at Peabody & Arnold LLP.

UPDATE

Title Standards Committee mulls MUPC, *Eaton*

BY RICHARD M. SERKEY

The impending effective date of the Massachusetts Uniform Probate Code has generated a great deal of discussion by the Title Standards Committee as to whether, when a decedent leaves a will containing a power to sell real estate, a personal representative appointed pursuant to an informal testacy proceeding has the power to sell the real estate without a license. The committee has been working with REBA's legislative counsel, Edward Smith, to have this issue clarified in the technical corrections bill that is presently under consideration by the Legislature. The committee is also working on a proposed title standard in the event that the Legislature does not address it.

The anxiously awaited decision in *Eaton v. Federal Nat. Mortg. Ass'n*, in which the Supreme Judicial Court is expected to decide whether a foreclosure is invalid if the foreclosing mortgage holder does not hold the note secured thereby at the time of the foreclosure, has also occupied the attention of the committee. A subcommittee is drafting proposed legislative solutions that would address projected possible outcomes in this case.


Rich Serkey

In the meantime, the committee has proposed, and the board of directors has voted to recommend, the adoption of the following:

Proposed Title Standard No. 78: All too often, the record title contains a tax taking, a notice of the filing of a petition to foreclose the tax taking, followed by an instrument of redemption of the underlying tax taking – but nothing more concerning the petition. The proposed standard would obviate the need to record a notice of the withdrawal of the petition in such circumstances.

Proposed Practice Standard No. 25: Because even bank checks and cashier checks are subject to various holding periods, it is better practice for the conveyancing attorney to require receipt of significant funds and, upon request that is reasonable under the circumstances, to make disbursement of significant funds by wire rather than by check. The proposed standard codifies this approach, while still leaving it to the discretion of the conveyancing attorney to determine when the amount of funds is "significant" and when a request is "reasonable under the circumstances."

Rich Serkey co-chairs the association's title standards committee and is very active in municipal and charitable affairs of his hometown of Plymouth. A partner in the firm of Winokur, Serkey & Rosenberg PC, Rich can be contacted by email at rserkey@wwsr.com.

Land Court Case information now available online

The new year has marked the beginning of a new era for the Land Court, lawyers, litigants and the general public. On Dec. 30, 2011, the Land Court announced the launch of full, free online access to dockets and other case information. The service is called CourtView eAccess, and the website address is www.masscourts.org. No password or registration is required.

Visiting www.masscourts.org brings the user to an initial screen with a prominent button that says "Click Here" to search public records (there is a link on this screen to a set of detailed instructions). Clicking on "Click Here" takes the user to the main eAccess search page. After choosing the appropriate court department – Land Court is currently the only choice – cases can be searched by party name, case number or case type. Searching by case type (miscellaneous, registration, etc.) requires a date range, and allows searches to be refined by choosing the city or town in which the property is located. Once a case (or list of cases) is found, the system displays the parties and their counsel, calendar events (both past and future), docket entries, and the disposition of the case. The system is easy to navigate and produces results quickly.

In addition to providing lawyers, litigants and the public with a convenient, cost-effective way of getting case information, it is hoped that the eAccess system will help ease the burden on overworked Land Court staff members, who spend hours each day fielding questions by telephone about matters such as the status of a pending case, whether a hearing has been scheduled, or whether a particular filing has reached the docket. Land Court Recorder Deborah Patterson reports that the court's eAccess site has had thousands of hits during its first few weeks of operation.

DANE

CONTINUED FROM PAGE 8

difficult it may be to find, and therefore, notify the client. The point of departure must be the information contained in the file itself. If that proves unavailing, the Internet provides many resources, such as the following free sites:

- www.switchboard.com
- www.MyLife.com
- www.WhitePages.com
- www.LinkedIn.com
- www.Intelius.com
- www.PeopleFinders.com
- www.123People.com
- wwwAddresses.com
- www.PeopleLookup.com
- www.USSearch.com

Also for clients you believe may have died, there is www.socialsecuritydeathindex-search.com. Lexis-Nexis Accurint (www.accurint.com) charges $4 for a "person search," and their price sheet states that there is no charge if "no records are returned." In addition, in Massachusetts, you can do free online searches by name in the various registries of deeds and the corporate filings at the office of the Secretary of the Commonwealth at www.corp.sec.state.ma.us/corp/ under "search corporate database."

However, there will be many old clients that you cannot locate with reasonable effort and expense. Therefore, in many instances, the most attractive option may be option C, the conversion of the paper file into a reliable and secure electronic file.

While this involves some staff time, in many cases the amount of time involved will be less than that required to track down and notify the client. Also, since the property rights of the client in non-trust property are not exclusive, there are some tangible benefits that accrue to an attorney by virtue of continued access to files if they are easily accessible, take up no space, and may be maintained indefinitely at a nominal cost. This will be the subject of our next article.

Henry Dane serves on the REBA Ethics Committee.

THE REAL ESATE BAR ASSOCIATION'S

2012 SPRING CONFERENCE

BEST WESTERN ROYAL PLAZA HOTEL
181 BOSTON POST ROAD WEST, MARLBOROUGH

MONDAY, MAY 7, 2012 | 7:30 A.M. – 3 P.M.

BREAKOUT SESSIONS

The Frontiers of Condominium Use Restrictions
V. Douglas Errico; Clive D. Martin; Diane R. Rubin

SALON A
8:30 a.m. – 9:30 a.m.
9:45 a.m. – 10:45 a.m.

Nightmare Closings
Elizabeth J. Barton; Roxanne E. Richard; Jack I. Smolokoff

SALON B
8:30 a.m. – 9:30 a.m.
9:45 a.m. – 10:45 a.m.

Current Legislation: The Foreclosure Impasse & Other Issues
Francis J. Nolan; Laurel H. Siegel; Edward J. Smith

SALON C
8:30 a.m. – 9:30 a.m.
SALON E
11 a.m. – 12 p.m.

Standing in Zoning/ Land Use Litigation
Daniel P. Dain; Michael K. Murray; Mary K. Ryan

SALON D
8:30 a.m. – 9:30 a.m.
9:45 a.m. – 10:45 a.m.

Dealing with Conservation Commissions: From Pitfalls to Permits
Kenneth P. Fields; John J. Goldrosen; Gregor I. McGregor

SALON C
9:45 a.m. – 10:45 a.m.
SALON D
11 a.m. – 12 p.m.

Handling Properties Affected by *Ibanez*
Eugene Gurvits; Richard P. Halfmann; Amanda Zuretti

SALON E
8:30 a.m. – 9:30 a.m.
9:45 a.m. – 10:45 a.m.

Recent Developments in Massachusetts Case Law
Philip S. Lapatin

SEMINAR ROOM
12:15 p.m. – 1:15 p.m.

FOR MORE INFORMATION AND TO REGISTER ONLINE, VISIT WWW.REBA.NET.

PRACTICAL SKILLS SESSIONS

SELECTED TOPICS ON THE NEW UNIFORM PROBATE CODE
Presented by Mark A. Leahy

SEMINAR ROOM
8:30 a.m. – 9:30 a.m.

CLEARING COMMON TITLE ISSUES
Presented by Neil D. Golden and Edward A. Rainen

SEMINAR ROOM
9:45 a.m. – 10:45 a.m.

ENCORE PRESENTATION OF THE AMC11 SESSION:
Review of Foreclosure Documents
Presented by Ward P. Graham

SEMINAR ROOM
11 a.m. – 12 p.m.

LUNCHEON PROGRAM
1:20 p.m. – 3 p.m.

KEYNOTE ADDRESS
"The American Dream: An Investment or a Place to Live?"
William J. Poorvu, Harvard Business School
1:20 p.m. – 1:45 p.m.

REBA PRESIDENT'S WELCOME & REMARKS
Christopher S. Pitt, President
1:45 p.m. – 2:15 p.m.

BUSINESS MEETING
Report of the REBA Ethics Committee:
Co-chairs, Daniel C. Crane; Robert T. Gill; Jennifer L. Markowski

Report of the REBA Title Standards Committee:
Co-chairs, Richard M. Serkey; Nancy Weissman
2:15 p.m. – 2:45 p.m.

ADJOURNMENT
3 p.m.

GOLDEN: Millions in wasted premiums

CONTINUED FROM PAGE 5

I am happy to say that in my 35 years of practicing condominium law I find that the great majority of bylaws require broad interior unit coverage on the master policy. The bad news – and it is indeed bad – is that since FNMA has left the review of coverage up to the lenders, and the lender s do not have the expertise or even desire to review condominium bylaws, lenders invariably will require interior coverage on the unit owner's policy even though the master policy already covers the interior. I was told by one bank executive that no one will ever lose their job because they denied a loan, but a person will lose their job if they approve a loan and the bank has to buy the loan back. The lenders are risk adverse by necessity. This has resulted in unit owners paying collectively millions of dollars for unnecessary coverage and those owners will never see a dime of it. Why? Remember that FNMA requires the master policy to be primary. That means that if there is damage to the interior of the unit and the master policy covers it, the *master policy* must pay the claim. As a result, the agents and insurance companies issuing these interior coverage policies are laughing all the way to the bank. Imagine being able to collect premiums and never having to pay a claim.

I believe that an attorney representing a buyer should understand the insurance sections of the condominium bylaws and make sure that the client is not forced to needlessly pay additional premiums. I also believe that FNMA must take a closer look to make sure that this double coverage is eliminated. If need be, government agencies will have to get involved. It is difficult enough in this environment to qualify for a loan. If unnecessary insurance premiums are added in to the cost of owning a home it will have an adverse affect on borrowers.

A longstanding member of REBA's title standards committee, Neil Golden is a partner in the firm of Gilmartin, Magence & Ross, LLP. Neil can be contacted by email at ngolden@gmr-law.com.

BLOOM

CONTINUED FROM PAGE 3

In the *Eaton* case, the original mortgage was held by MERS, which then assigned the mortgage to Green Tree Servicing, LLC, which was acting as a servicer for FNMA. Bank United was the original holder of the note, which then sold the note to FNMA. When Green Tree foreclosed, it did so on behalf of FNMA, the actual owner of the note. Yet none of these facts could be determined from the title records, which simply reflected a mortgage to MERS that was then assigned to Green Tree.

The only argument for demanding unity of the note and mortgage is the theoretical possibility that a mortgage holder can foreclose on a debtor's property and the note holder can subsequently make an independent claim for the same debt evidenced by the note. The proponents of the unity theory overlook the fact that no such claim has arisen or occurred in Massachusetts. In today's modern lending market, it is inconceivable that a foreclosing mortgagee is not acting at the direction of the note holder or the note holder's servicer.

Should the SJC nevertheless rule that the note and mortgage must be united in order to properly foreclose a mortgage, one can only hope that the court will do so on a prospective basis, as the *amicus* briefs of such entities as the Real Estate Bar Association for Massachusetts and the American Land Title Association have urged. Even then, the court's holding would have to defer its effective date in order to allow the Legislature sufficient time to enact legislation to address the means of reflecting ownership of notes in a manner that would be reflected in the title records.

And so the real estate industry nervously awaits the SJC's decision: Will the Superior Court ruling be upheld on a retroactive basis bringing chaos and paralysis to the industry (not only in Massachusetts, but across the country)? Will the court overrule the lower court decision and reject the proposition of unity of the note and mortgage? Or will the court adopt the proposition, but only apply it prospectively? The seismic tremors are increasing as the days and weeks pass by and the real estate industry awaits an outcome that is beyond its control – as is nature when a volcano erupts.

Edward M. Bloom is a partner in the Real Estate Department at Sherin and Lodgen and the immediate past president of the Real Estate Bar Association for Massachusetts.

STEIN: Conveyancers caught in foreclosure limbo

CONTINUED FROM PAGE 3

to its validity or obtain a newly executed instrument.

THE SERVICE MEMBERS CIVIL RELIEF ACT COMPLAINT

In the case of *HSBC Bank USA, N.A., as Trustee, Plaintiff v. Jodi Matt, Defendant*, Land Court Case No. 10 MISC 421195, Judge Long found that the plaintiff had sufficient standing to determine Ms. Matt's status under the Servicemembers Civil Relief Act. The court held that while HSBC may or may not be the current holder of Matt's note and mortgage, a requirement, at least with respect to the mortgage, to commence G.L. c. 244, §14 foreclosure proceedings, the record clearly shows that HSBC has a contractual right to become that holder.

This case will now be heard on appeal by the Supreme Judicial Court. Note that in the *Matt* case, an assignment to HSBC Bank USA, N.A., as trustee, was recorded at the registry of deeds from New Century Mortgage Corporation. This assignment, however, was dated Nov. 6, 2007, at a time when New Century was in bankruptcy. Matt is claiming that the assignment is invalid, so the plaintiff held neither the note nor the assignment at the time of the filing of the complaint. However, there are numerous instances where the complaint, under the Servicemembers Civil Relief Act, is filed by a party who has no apparent interest in the mortgage.

Subsequent to the Land Court decision in the *Matt* case, in December 2011, the Commonwealth of Massachusetts filed a lawsuit against a number of lenders, as well as MERS and MERS Corp., Inc. One of the issues raised in the complaint is that a lender's failure to secure a valid written assignment of the mortgage prior to initiating a foreclosure violates G.L. c. 244, §1, et seq., G.L. c. 183, §21 and is unfair and deceptive in violation of G.L. c. 93A, §2. The "illustrative examples" include instances where the Servicemembers Civil Relief Complaint was filed by a party who was not the mortgagee of record. Interestingly, the "illustrative examples" cover registered land.

The Supreme Judicial Court will now decide whether to expand the *Ibanez* requirement to require that a party foreclosing must have record title to the mortgage at the time of filing the Servicemembers Civil Relief Act Complaint.

GREEN CARDS

I personally require "green cards" as evidence that notice of the foreclosure sale was given to all interested parties of record pursuant to M.G.L. c. 244, §14. Title reports should provide the identity and, hopefully, the address for the mortgagors, who should be checked for probate, divorce and bankruptcy and on junior lienholders who have recorded interests of record. If the mortgagors do not reside in the premises and a different address is available from the records at the registry of deeds, you will want to determine that notice was delivered to the correct address.

The Internal Revenue Service requires specific notice under IRC sec. 7425(d). Remember that the Internal Revenue Service has a 120 day right of redemption after the date the public sale is held. See REBA Title Standard No. 28 entitled, "Release of Right of Redemption After Foreclosure in Respect of a Federal Tax Lien."

A city or town which holds an agricultural or horticultural tax lien, pursuant to M.G.L. c. 61A is entitled to 90 days of notice before a foreclosure sale pursuant to M.G.L. c. 61A, §14.

If a foreclosure occurred more than three years ago, and you have a valid certificate of entry, you should not need to review the green cards. If the current owner also has an owner's title insurance policy, and you will be writing title insurance on the same company, you may skip reviewing the green cards; however, this is something you should review with your title insurer.

SHORT SALES

Short sales continue to be a common occurrence. There are numerous issues for the conveyancer to consider when closing on a short sale transaction.

A short sale affidavit prepared by First American Title Insurance Company includes five questions that should be answered before proceeding with the short sale transaction:

The sale of the mortgaged premises is an "arm's length" transaction, between the parties who are unrelated and unaffiliated by family, marriage, or commercial enterprise.

There are no agreements, understandings or contracts between the parties that the seller(s) will remain in the mortgaged premises as a tenant or later obtain title or ownership of the mortgaged premises.

Neither the seller(s) nor the buyer(s) will receive any funds or commissions from the sale of the mortgaged premises, except as may be allowed to the seller by the short sale approval letter (if applicable).

There are no agreements, understandings or contracts relating to the current sale or subsequent sale of the mortgaged premises that have not been disclosed to the lender.

All amounts to be paid to any party, including holders of liens on the mortgaged premises, in connection with the short sale payoff transaction have been disclosed to and approved by the lender and are reflected on the settlement statement.

In addition, your HUD statement should be approved by the lender and should clearly set out the transaction. Any fees to be paid by the seller "outside of closing" should also be disclosed.

The payoff statement for the mortgage should come directly from the short sale lender and, if the property is in foreclosure, the lender's foreclosure attorney must provide a written confirmation that, upon receipt of the payment by the discounting lender of the amount set out in the lender's "net" payoff letter, the attorney will file a dismissal of the foreclosure action and the necessary orders vacating the judgment.

Be particularly wary of any flip transactions. The owner's lender must have full knowledge of the flip sales price, and you must run this by your title insurer.

Be sure the seller is checked on the PACER system for bankruptcy.

IS THE PROPERTY OCCUPIED AT THE TIME OF CLOSING?

How do you determine whether the mortgagor is still in possession of the property when the purchaser will be an investor? You should be in contact with the broker and the lender in possession and make inquiry as to whether the property is occupied. Many lenders refuse to sign mechanics lien affidavits at closing, but you may want to require a separate affidavit specifically regarding the question of possession. If the mortgagor is in possession, this fact alone, for some title insurers, is determinative that they will not insure the transaction. A mortgagor in possession represents the possibility of a lawsuit challenging some aspect of the foreclosure proceeding.

As I wrote in *REBA News* several months back when reviewing the cases leading up to *Eaton*, an adverse decision in the *Eaton* case would throw numerous titles into flux. Now we wait, not only the decision in *Eaton*, but also the decision in *Matt*. It does not appear that any easy answers await us.

Joel Stein, of the Law Office of Joel A. Stein in Norwell, co-chairs REBA's Title Insurance and National Affairs Committee. He can be reached via email at jstein@steintitle.com.

MENTORING

CONTINUED FROM PAGE 1

bar admitees have opted to hang out their own shingle in a solo practice. The program is designed to pair up experienced, dedicated lawyers with colleagues seeking occasional guidance and support. The experienced member serves as a mentor to a less-experienced colleague. Each pairing has a six-month duration although the term can be extended if mentor and mentee so elect. Our mentors have found the program to be a rewarding professional experience.

To learn more about REBA member benefits, particularly the ethics hotline and the peer-to-peer mentoring program, don't hesitate to contact me.

Andrea Morales serves as office administrator and event coordinator for the Real Estate Bar Association. She can be reached by email at morales@reba.net.