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REBA news
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In *Eaton*, SJC requires unification of mortgage and note to foreclose

BY CHRISTOPHER S. PITT

Last month the Supreme Judicial Court announced its decision in *Henrietta Eaton v. Federal National Mortgage Association et al.*, easily the most anticipated real estate ruling of the court in years. In a decision written by Justice Margot Botsford, a unanimous court held that the term "mortgagee," as used in the Massachusetts mortgage foreclosure statutes, means a person or entity that not only holds the mortgage, but also either holds the mortgage note or is acting as the authorized agent of the note holder.

Chris Pitt

The court acknowledged that its construction represented a new interpretation of the relevant statutes, and chose to apply the new rule prospectively, only to foreclosures under power of sale where the statutory notice of sale pursuant to MGL c.244, §14 is provided after the date of the decision.

In 2007, Henrietta Eaton refinanced her home in Roslindale, giving a note in the amount of $145,000 to BankUnited FSB, and a mortgage to Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for BankUnited. Subsequently MERS assigned its rights in the mortgage to Green Tree Servicing LLC, and recorded an assignment with Suffolk Deeds. The court observed that the record contained no evidence of a corresponding transfer of the note, which "was indorsed in blank by BankUnited on an undetermined date." In a footnote, the court noted that, according to defendants' brief, the note was transferred after indorsement to the Federal National Mortgage Association (Fannie Mae), but that there is no record

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Warren Fitzgerald joins REBA Dispute Resolution

Warren Fitzgerald, a former president of both the Massachusetts Bar Association and the Massachusetts Academy of Trial Lawyers, has joined the Real Estate Bar Association Dispute Resolution's panel of neutrals.

"With Warren on board, we can enhance and expand the areas of expertise that we offer to our clients across the commonwealth," said Mel Greenberg, president of REBA DR.

"Warren brings an almost unprecedented breadth of experience to our mediations programs," said Peter Wittenborg of REBA DR. "He brings more than 30 years of experience as a trial lawyer and negotiator representing parties in business, commercial municipal and personal injury litigation."

Fitzgerald's mediation experience includes many areas of law and practice including easements, condominium disputes, environmental contamination, construction, premises liability, business disputes, contracts, insurance coverage, labor and employment, intellectual property, product liability, fires and explosions, professional and medical malpractice, property damage, admiralty, estates and consumer class actions.

Fitzgerald has lectured many times on topics relating to trial practice and ADR for MCLE and numerous law schools and bar associations. He was chair of the MBA ADR committee from 2007 to 2009 and has served on the Massachusetts Trial Court Standing Committee on Dispute Resolution since 2007.

Fitzgerald has been selected as a Massachusetts and a New England "Super Lawyer" each year since publication began. He was elected to the American Board of Trial Advocates in 2009. He graduated from Boston University, magna cum laude with distinction, where he was inducted into Phi Beta Kappa, and Boston University School of Law, where he was an editor of the Law Review.

For more information about REBA Dispute Resolution, go to www.reba.net. To schedule a mediation or case evaluation with Warren, contact Nicole Cunningham at cunningham@reba.net.

Recent cases pose new challenges for condo boards

BY V. DOUGLAS ERRICO

Attorneys and judges have always recognized that community associations are, for all practical purposes, quasi-governmental in nature. They are empowered by statute to levy "taxes" (in the form of assessments) and enact and enforce their own "laws" (restrictions, rules and regulations). When those powers have been legally challenged, courts all over the country have, by and large, upheld them, as long as they have been applied in a reasonable manner. However, the application of constitutional freedoms as a defense to rules enforcement has not historically found a foothold, presumably because of the lack of state action in a private real estate setting.

Doug Errico

The legal landscape is now shifting on this subject, it appears. Late last year, the Massachusetts Appeals Court ruled that the written, verbal and nonverbal speech of an individual unit owner may be subject to constitutional protections when their restriction is sought to be enforced by the association in a judicial proceeding. The case, more fully discussed below, is *Board of Managers of Old Colony Village Condominium v. Preu,* 80 Mass.App. Ct. 728, 956 N.E.2d 258 (2011); further appellate review denied by the Supreme Judicial Court, March 30, 2012.

To put the matter in historical perspective, the first Massachusetts case of any relevance was probably *Noble v. Murphy,* 34 Mass.App.Ct. 452, 612 N.E.2d 266 (1993), which involved (as so many bitterly fought condominium cases do) the enforcement of a pet restriction against a dog owner. The SJC in *Noble* enunciated a standard of review based upon "equitable reasonableness," stating that as long as the restriction has been properly adopted, it is clothed with a very strong presumption of validity, especially when the offending unit owner had record notice of it in advance. The court, however, left the door open for a heightened level of scrutiny where some fundamental right or public policy is at stake.

These issues then lay relatively dormant for years thereafter, both in Mas-

See FREE SPEECH, page 9

Land Court Judge Judith Cutler to speak at Land Use meeting

Land Court Associate Justice Judith C. Cutler will address a luncheon meeting of the REBA Land Use and Zoning Committee in September 2012. The luncheon program, which is open to all REBA members, will be hosted by Greg D. Peterson, committee co-chair, at Tarlow, Breed, Hart & Rogers, P.C. at 101 Huntington Ave. (fifth floor), in Boston.

Cutler, appointed to the bench in 2009, was a principal in the Boston law firm of Kopelman & Paige, P.C., where she represented municipalities in a variety of land use matters including zoning, subdivision control, public and private ways and affordable housing.

This program is open to all REBA members. Additional information to follow.

Decisions in *Eaton*, but questions remain

CONTINUED FROM PAGE 1

evidence of that transfer. After Eaton failed to make payments on the note, Green Tree proceeded to foreclose the mortgage. Green Tree, the high bidder, assigned its bid to Fannie Mae, and a foreclosure deed was recorded conveying the property to Fannie Mae.

In 2010, Fannie Mae brought a summary process action in the Housing Court to evict Eaton. Eaton defended on the ground that Green Tree did not hold the mortgage note at the time of the foreclosure auction and that therefore the foreclosure sale was void. The Housing Court judge stayed the summary process action to afford Eaton time to seek injunctive relief in the Superior Court. In Superior Court the parties stipulated (for the limited purpose of Eaton's injunction motion) that Green Tree did not hold Eaton's note at the time of the foreclosure sale. The Superior Court granted the injunction. Fannie Mae requested interlocutory review in the Appeals Court which was denied by a single justice, but before the request could be considered by the full court, the SJC transferred the case to its docket of its own initiative.

Initially, the appeal proceeded quickly before the SJC. Oral arguments were heard last October Then in an extraordinary order in January, the SJC requested supplemental briefs on two limited issues: whether a requirement that the foreclosing party hold both the mortgage and the note at the time of the foreclosure would cloud any title having a foreclosure in the chain of title, regardless of when the foreclosure had taken place; and if the SJC were to hold that unity of the mortgage and note is required under existing law, on what authority the court might make such a holding prospective.

In its decision, the court first reviewed what it considered applicable common law principles, and concluded that "at common law, a mortgagee possessing only the mortgage was without authority to foreclose on his own behalf the mortgagor's equity of redemption or otherwise disturb the possessory interest of the mortgagor."

The court then analyzed Massachusetts' "statutes relating to the foreclosure of mortgages by the exercise of a power of sale," specifically MGL c. 183, §21 (defining the statutory power of sale) and MGL c. 244, §§11-17C. Ultimately the court construed "the term 'mortgagee' in G. L. c. 244, §14 to mean a mortgagee who also holds the underlying mortgage note."

Some effort was made to explain the technical rationale for applying the rule prospectively. The court apparently accepted the arguments of the defendants and many amici that the retroactive application of the unity rule would "wreak havoc with the operation and integrity of the title recording and registration systems," … "… because of the fact that our recording system has never required mortgage notes to be recorded."

Significantly, the SJC departed from the analysis of the Superior Court when it came to the question of whether the mortgagee must actually hold the original note.

> "Contrary to the conclusion of the motion judge, we do not conclude that the foreclosing mortgagee must have physical possession of he mortgage note in order to effect a valid foreclosure. There is no applicable statutory language suggesting that the Legislature intended to proscribe application of general agency principles in the context of mortgage foreclosure sales. [fn 25] Accordingly, we interpret G.L. c. 244, §§11-17C (and particularly §14) and G.L .c. 183, §21 to permit one who , although not the note holder himself, acts as the authorized agent of the note holder, to stand "in the shoes" of the "mortgagee" as the term is used in these provisions."

It remains to be seen how the practice of establishing of record that one either holds the note or is acting as the authorized agent of the note holder will develop. Both REBA's Title Standards Committee and the Land Court are developing affidavit forms by which such information can be certified and recorded. The court did not prescribe a specific method of certification, but did suggest that a c. 183, §5B affidavit would suffice. In footnote 28, it wrote that "It would appear that at least with respect to unregistered land, a foreclosing mortgage holder such as Green Tree may establish that it either held the note or acted on behalf of the note holder at the time of a foreclosure sale by filing an affidavit in the appropriate registry of deeds pursuant to G.L. c. 183, §5B." Nor did the court dictate what information would have to be in the §5B affidavit, saying simply that "[s]uch an affidavit may state that the mortgagee either held the note or acted on behalf of the note holder at the time of the foreclosure sale." In the past several decades, the practice has been to insert a simple statement in the affidavit of sale attached to the foreclosure deed pursuant in c. 244, §15 to the effect that all applicable notice requirements of c. 244 §14 have been complied with. Whether such a statement will be accepted to certify compliance with the *Eaton* rule remains to be seen.

The SJC may soon address the affidavit of sale again. In *Federal National Mortgage Association v. Oliver Hendricks*, Docket No. SJC-11234, the SJC has announced that it is soliciting amicus briefs in the case in which the "issue presented is whether the mortgagee's affidavit containing a conclusory statement of compliance with G.L. c. 244, s. 14, states sufficient facts to comply with the notice requirements included within the statutory power of sale set forth in that statute; to comply with M.R.Civ.P. 56(e); to be admissible under G.L. c. 244, s. 15. Whether the statutory power of sale form codified at G.L. c. 183 App., Form (12), originally drafted in 1912, is on its face insufficient. Argument is scheduled for September 2012."

The decision also makes a useful point about the MERS mortgage registration system. The original mortgage from Eaton was given to MERS, as mortgagee. The court states that under Eaton's mortgage, MERS or its assignee holds legal title to the Roslindale property with power of sale "solely as nominee" of the lender BankUnited (or its assignee). The decision quotes, without comment or criticism, provisions in the Eaton mortgage that "MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender. …" In footnotes 5, 6, 7, 27 and 29, the court discusses the role of MERS in the Eaton facts, as defined both in the mortgage and in the MERS Rules of Membership.

The court acknowledges MERS' role as the initial mortgagee, and as the assignor of the mortgagee's rights and responsibilities to Green Tree. In so doing, the *Eaton* decision appears to refute the arguments of some that, because it never holds the note but acts at most as an agent of the note holder, MERS cannot ever lawfully foreclose a mortgage in Massachusetts, that foreclosures conducted by MERS in the past might be void, and that arguably any mortgage given or assigned to MERS might be void and unenforceable.

In the past year, MERS has, by its own regulations, stopped foreclosing mortgages in its own name. Yet the court's unquestioning acceptance of the role of MERS as an entity that can be a mortgagee under Massachusetts law validates the use of the MERS system in Massachusetts, to the relief of the mortgage industry and to the relief of those consumers who have a MERS mortgage in their titles.

Land Court Chief Justice Karyn F. Scheier received the Boston Bar Association's Haskell Cohn Distinguished Judicial Service Award on June 27 at a reception at BBA headquarters, attended by many REBA members. "As chief justice of the Land Court of the Commonwealth of Massachusetts, Karyn Scheier demonstrates a deep respect for the traditions and history of her court, while at the same time fostering a culture that sets her court at the leading edge of innovation," said BBA President Lisa C. Goodheart. "Providing the leadership essential for meeting the challenges faced by a court with a complex portfolio of responsibilities and statewide jurisdiction, Chief Justice Scheier has consistently focused on ensuring that the Land Court administers justice efficiently and effectively." Pictured, Scheier and Goodheart.

Photo Credit: Eric Fullerton, Boston Bar Association

Chris Pitt, REBA's incumbent president, concentrates his practice in commercial and residential real estate matters, practicing with the Boston office of Robinson & Cole LLP. He has been a frequent media commentator on the SJC's Eaton decision and predecessor cases. Chris can be contacted by email at cpitt@rc.com.

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MISSION STATEMENT

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

MENTORING STATEMENT

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

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COMMENTARY

Vote for me and I'll set you free

BY PAUL F. ALPHEN


Paul Alphen

Campaign season is well underway and we will be bombarded with the bombastic claims of incumbents asserting that they have improved the economy, while their challengers assert that the incumbents are scoundrels. You probably saw the recent interview with an important statewide office holder declaring that his office was responsible for streamlining the land use permitting process. Mark Twain is credited with saying that "No man's life, liberty or property are safe when the legislature is in session." Today you would have to expand that to refer to thousands of boards and regulatory authorities spread throughout municipal, county, regional, state and federal offices.

Time was, a business person could build a new store simply by checking the zoning map and a few zoning provisions at Town Hall, and submitting a sketch to the Building Department. Today, the zoning map and by-law represent the tip of the permitting iceberg, and they cannot be found at Town Hall. Many towns have stopped publishing hard copies, and you are forced to find the documents online, maintained in a variety of hard-to-download and hard-to-read formats. You can't bill a client for the time that it takes to piece together the puzzle pieces of some bylaws and their various amendments, overlay districts and pending amendments.

If you are in an area that is subject to regulatory oversight, such as Cape Cod or the Charles River Watershed, we wish you Godspeed and the patience of Job.

While you are at it, try to find all the *non*-zoning bylaws recently adopted that regulate land use, but did not require a two-thirds vote of Town Meeting (and are exempt from the zoning freeze provisions of Chapter 40A, Section 6). Look for requirements pertaining to storm water management, earth removal, demolition delay, wetlands, scenic roads, hazardous materials storage, road openings, health and others. Behind the various zoning and non-zoning by-laws are an equally complicated collection of regulations adopted by a variety of local boards, all which are subject to constant change. If you search deeper (which usually requires a few trips to Town Hall) you may find board policies and procedures, including fee schedules and application filing requirements. Also be sure to read the various "master plans." There could be an open space master plan, a commercial zoning district master plan, a sidewalk master plan and other esoteric master plans in addition to the "official" master plan. While said documents do not have the force of law, some board members like to quote provisions thereof as if they were passages from the Bible. Somewhere along the way you have to incorporate the unwritten rules of the board. My favorites, or course, pertain to expectations of the payment of "mitigation" in exchange for permits.

If you are in an area that is subject to regulatory oversight, such as Cape Cod or the Charles River Watershed, we wish you Godspeed and the patience of Job.

At some point you have to start collecting the laws and regulations promulgated by state and federal government. Remember when the *Code of Massachusetts Regulations* was contained in a set of only 25, four-inch thick binders? Ah, the good old days. Like many of you, I try to regularly attend some of the environmental regulatory CLE updates chaired by the prolific Greggor McGreggor, and each time I leave the session with a knot in my stomach. Have you had to explain to a small business person the ramifications of their land being designated as estimated habitat for rare species? Has one of your clients received a Findings of Violation and Order for Compliance from the EPA for alleged violations of the Clean Water Act? Not only is the law and living and breathing thing, it is a seven-headed dragon.

Even if you somehow successfully navigate the permitting gauntlet, you are not safe. There are numerous stories wherein local boards have voted to deny projects because two members of a board thought the project was "not in the best interest of the town," or they just did not like the project. Take a look at *Tirone Dev. Corp. v. Ward*, 11MISC444552AHS, 2012 WL 695722 (Mass. Land Ct. Mar. 2, 2012). The Agawam Planning Board denied a four-lot subdivision plan and the Land Court found that the board's conclusion that the subdivision will degrade the neighborhood, without *any* reference to related criteria in the Subdivision Rules and Regulations, was erroneous (as was their conclusion that the Homeowner's Association Agreement was inadequate, without providing further specifics). How does this still happen in 2012?

Of course, you also need to be prepared to defend an appeal from an abutter. All too often the appellant happens to be a competitor of the proposed new development, and the appeal process is used as a means to quash competition. As you know, such cases can go on for years and years notwithstanding the apparent lack of merit.

I hope you can laugh at the onslaught of campaign ads. Or do what I do, and hit the "mute" button.

REBA's president in 2008, Paul Alphen currently chairs the association's long-term planning committee. A frequent and welcome 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.

United States Supreme Court issues ruling in RESPA case

BY JOEL A. STEIN

With its decision in the case of *Freeman, et al v. Quicken Loans, Inc.*, decided May 24, 2012, the Supreme Court has settled the longstanding debate as to the interpretation of Section 2607(b) of the Real Estate Settlement Procedures Act (RESPA).

Joel Stein

As has previously been reported in *REBA News*, the United States Circuit Courts have been split in their interpretation of this section. Now the question of whether Section 8(b) of RESPA prohibits a real estate settlement services provider from charging an unearned fee only if the fee is divided between two or more parties has been settled.

The petitioners in this case were three married couples who obtained mortgage loans from Quicken, Inc. and in 2008 filed separate actions in Louisiana State Court stating that Quicken had violated Section 2607(b) by charging them fees for which no services were provided.

Two of the three couples alleged that they were charged loan discount fees, but did not receive lower interest rates in return. The allegations of the third party sent in a $575 loan "processing fee" and a "loan origination" fee of more than $5,100. Regarding the last allegation, Quicken stated that the loan origination fee was a mislabeled loan discount fee and further argued that loan discount fees fall outside the scope of Section 2607(b) because they are not fees for settlement services, but rather, as the Eleventh Circuit has held, as part of the pricing of a loan. The court did not express a view on this issue.

The lawsuits were removed to Federal Court, where the cases were consolidated. The District Court granted summary judgment on the ground that the petitioners' claims were not recognized under Section 2607(b) because the unearned fees were not split with another party. The United States Court of Appeals for the Fifth Circuit affirmed.

The relevant portions of Section 2607 read as follows:

Section 2607(a) provides: "No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person."

The neighboring provision, subsection (b), adds the following: "No person shall give and no person shall accept any portion, split, or percentage of any charge made or received from 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."

In reaching its decision, the court rejected a 2001 policy statement issued by the Department of Housing and Urban Development which states; in part, that Section 2607(b) "prohibit(s) any person from giving or accepting any unearned fees, i.e., charges or payments for real estate settlement services other than for goods or facilities provided or services performed." 66 Fed. Reg. 53057 (2001). It "specifically interprets Section 2607(b) as not being limited to situations where at least two persons split or share an unearned fee."

The court, in an opinion written by Justice Antonin Scalia, held that "In our view, Section 2607(b) unambiguously covers only a settlement service provider's splitting of a fee with one or more persons; it cannot be understood to reach a single provider's retention of an unearned fee."

The petitioners acknowledged in their brief that fee-splitting decisions have held that the Statute does not impact unreasonably high fees, but argued that a settlement service provider can "make" a charge and then "accept" the portion of the charge consisting of 100 percent. The Petitioners further argued that the consumer is the person who gives a portion, split or percentage of the charge to the provider who accepts it. The court rejected this argument, stating that Section 2607(b) requires two distinct exchanges; the first being the charge made to the consumer and the second when the provider gives, and another person accepts a portion or split of that charge. The court notes "Congress's use of different sets of verbs with distinct tenses to distinguish between the consumer-provider transaction and the fee-sharing transaction."

The court further notes that the petitioners' interpretation of the statutory language would make "lawbreakers of consumers" if the consumer was the party giving the portion of the charge.

Scalia noted that the phrase "portion, split or percentage" reinforces the conclusion that the Statute does not cover a situation which a settlement-service provider retains the entirety of a fee received from a consumer; while a portion or percentage can be interpreted to include 100 percent, the word "portion" typically means less than all and it is normal usage that governs the interpretation of text.

The court further rejected the petitioners argument that Section 2607(b) would be rendered "largely surplusage" in light of Section 2607(a) prohibition of kickbacks." The court also rejected this argument finding that certain actions would violate Section 2607(a), and certain different actions would violate 2607(b). Section 2607(a) would impact any kickback given for the referral of business while Section 2607(b) would impact the splitting of a fee to another person who has not rendered any services.

The court further rejected out of hand the petitioners' contention that Section 2607(b) should not be given its "natural meaning because to do so would allow a provider to charge and keep the entirety of a $1,000 unearned fee while imposing liability if the provider shares a portion of a $10 charge with someone else.

The decision by the court, which was unanimous, appears to be the correct reading of the statutory language. Unfortunately, the seeming contradictions between Section 2607(a) and Section 2607(b) have made it evident that there may be issues with the statute as drawn. For the consumers in this case, who were charged for "discount fees" but did not receive lower interest rates for their mortgage, it would appear that they cannot turn to RESPA for relief, but will be able to proceed under certain state laws to protect them from the alleged consumer violations. RESPA was originally construed as an anti-kickback statute, not a reasonable-charge statute.

In addition, the Consumer Financial Protection Bureau, which has now taken over enforcement of these claims from HUD, has its own ability to declare practices unfair, deceptive or abusive which cause "significant financial injury to consumers, erode consumer confidence and undermine the financial marketplace."

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.

Three Amigos: REBA President Chris Pitt recently hosted a private luncheon for Matt Ballard, vice president and New England regional manager for First American Title Insurance Company. Tom Moriarty, who co-chairs both the practice of law by non-lawyers committee and the residential conveyancing committee, participated. Pictured (left to right): Chris Pitt, Matt Ballard and Tom Moriarty.

Nominations for REBA's Denis Maguire Award for Community Service

REBA's board of directors, discerning a need to honor members contributing to their community outside of the legal profession, established the Denis Maguire Award for Community Service in 2005 to recognize outstanding REBA members who have demonstrated a commitment to their communities with an exemplary sense of caring, initiative and ingenuity.

Maguire served as the association's president for a two-year term in 1979 and 1980. Past recipients of the award include Lawrence A. DiNardo, Michael P. Healy and Shelley B. Rainen.

The REBA Nominating Committee is now accepting nominations from members for the next honoree. Any REBA member can nominate a candidate. If you would like to nominate a candidate, please send the name of your nominee, together with any background information about your nominee, to Edward M. Bloom, chairman, REBA Nominating Committee at embloom@sherin.com.

REBA accepting nominations for association's highest honor, the Richard B. Johnson Award

The Richard B. Johnson Award was established in 1978 to honor the memory of Dick Johnson, a remarkable member of the conveyancing bar who died the year before. The award is given to REBA members who have made an outstanding contribution to real estate or conveyancing practice, a lifetime achievement award.

Recent honorees include the Hon. Rudolph Kass (ret.), Jon S. Davis and Joel A. Stein. The most recent honoree was Philip S. Lapatin in 2008.

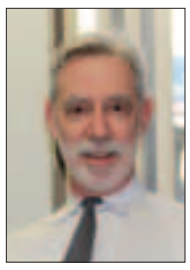
The REBA Nominating Committee is now accepting nominations from members for the next honoree. Any REBA member can nominate a candidate. If you would like to nominate a candidate, please send the name of your nominee, together with any background information about your nominee, to Edward M. Bloom, chairman of the REBA 2012 Nominating Committee, at embloom@sherin.com.

Sign on the dotted line – or else!

Fee agreements of the future

BY JAMES S. BOLAN

It is anticipated that in the near future, the Supreme Judicial Court will require that hourly – not just contingent – fee agreements must be in writing to be in compliance with disciplinary rules. When that change takes place, will such a new ethics standard affect the application of civil law? As the Comments to the Disciplinary Rules note, they are "rules of reason" and are "designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies." But, as the court stated in *Fishman v. Brooks*, while an ethics violation is not per se an actionable breach of duty to a client, a violation of that rule may be some evidence of the attorney's negligence. If Rule 1.5 is amended to require fee agreements other than just contingent agreements to be in writing, then will the failure to do so result not only in lawyers being subject to possible discipline, but will the lack of a written agreement become evidence in a civil action related to the representation and fees?



Jim Bolan

There are a number of civil cases that express the risk of failing to have a written agreement. In a recent case in New York, *Asesores Y Consejeros Aconsec CIA S.A. dba Coronel Y Perez Abogados v. Global Emerging Markets North America*, 08 CIV. 9384 (MGC) (S.D.N.Y. 2012), the client failed to sign the requested fee agreement, even after proposing some minor, non-material term changes. The client also failed to inform the firm that payment of its fees was contingent on the closing of an acquisition. The client directed the firm to start work immediately because of time pressures even though no fee agreement had been signed. The firm repeatedly demanded that the agreement be signed, but neither it nor a retainer was provided. Nonetheless, the firm completed the work requested and sent monthly bills. When the acquisition failed, the client told the firm it would not pay the bill and asserted that it had not signed any agreement.

In New York and Massachusetts, parties can demonstrate the existence of a contract through objective evidence, including communications such as emails. Silence on material terms can be construed against that party if silence would lead to detrimental reliance.

Rule 1.5(c) requires a contingent fee to be in writing. Thus, in a case where a portion of a contingent fee agreement was not in writing, and, thus, not in compliance with the rule, the firm could not introduce parol evidence to explain or import meaning to the agreement. See *Grace & Nino v. Orlando*, 41 Mass. App. Ct. 111 (1996). Ambiguities in any fee agreement are construed against the drafter. In *Matter of Kerlinsky*, 406 Mass. 67 (1989), an attorney was censured for, among other things, increasing the one-third percentage fee provided for in the contingent fee agreement to one-half of a tort recovery for handling a successful appeal from a defendant's verdict when the fee agreement did not specify that an increased percentage of the recovery would apply in the event of an appeal.

What happens, in the future, if, as and when a disciplinary rule requires that fee agreements be in writing? Would the violation of such a rule inure to the detriment of the firm? Will a changed ethics standard overtake civil law? The time to change practice methods is now, in advance of new rules and standards.

These changes are likely to have an impact on the way in which real estate lawyers enter into and manage client relationships. For example, if the new rule requires a written agreement for each client as opposed to each matter, one way to handle multiple representations for a single client, such as a lender, for example, might be to create a master agreement so that each successive closing falls within the master agreement. Now is the time to consider how to memorialize fee arrangements with clients so that when new rules appear, we will be ready to react quickly.

FEE AGREEMENT RULE CHANGES

Rule 1.5(c) was recently substantially amended to conform to three Supreme Judicial Court decisions in *Malonis v. Harrington*, 442 Mass. 692 (2004), *Liss v. Studeny, 450 Mass. 473 (2008), and Matter of an Attorney*, 451 Mass. 131 (2008). Specifically, the changes are as follows:

> 1.5(c)(4) adds that, if the lawyer intends to charge a fee other than the contingent fee, the lawyer must set forth how that fee will be calculated. For example, a hybrid fee or a partial flat fee offset against the rest of the fee, would have to be fully explained. 1.5(c)(7) addresses the liability for payment if the attorney-client relationship terminates prior to the end of a contingent fee case. This section requires that, if a lawyer intends to pursue a claim for fees and expenses on premature termination, the agreement must state that the client is potentially liable for such charges, must state the basis on which the fees and expenses will be claimed and, if applicable, any method of calculation. This is an instance where the failure to describe and agree in writing will result in the lawyer not being entitled to be paid unless the contingency has occurred. See *Liss v. Studeny*, 450 Mass. 473 (2008)

1.5(c)(8) is directed at successor counsel following *Malonis v. Harrington*. The fee agreement must state whether the client or the successor lawyer is to be responsible for payment of former counsel's fees and expenses.

The last paragraph at the end of Rule 1.5(c) also sets out additional accounting requirements per the court's decisions in

See FEE AGREEMENTS, page 6

Brokers and transactional attorneys beware: Your emails can form a contract

BY ALAN E. LIPKIND

Under the Statute of Frauds, M.G.L. c. 259 §1, an action cannot be brought to enforce a contract for the sale of real estate unless the contract is in writing and signed by the party to be charged therewith. A recent Superior Court decision, *Feldberg v. Coxall*, found that an exchange of emails among parties pursuing a purchase and sale transaction can constitute an enforceable real estate contract, even if the seller never signed an offer to purchase (OTP) or a purchase and sale agreement (P&S).

Alan Lipkind

In many Massachusetts localities, buying property is a two-step process – the parties execute an OTP, sometimes with the assistance of counsel, followed by a more comprehensive purchase and sale agreement (P&S). Not all jurisdictions have this practice – in some jurisdictions it is a one-step process, with only a P&S. Although the two step process allows buyers to dip their toes in the water – risking the relatively minimal deposit submitted with an OTP until they can get an attorney involved to review the P&S – this two-step process occasionally poses risks to buyers and sellers because it leads to confusion, and hence litigation, regarding whether an enforceable contract has been formed prior to the execution of a P&S. After a seller's acceptance of an OTP, but before a P&S has been signed by buyer and seller, sellers can be tempted by better offers, and buyers are tempted by other opportunities. Disputes often arise after the execution of an OTP, but before a P&S has been executed.

It has long been the law in Massachusetts that if the parties have agreed upon all the material terms of a sale in the OTP, and they intend to be bound by those terms, they are bound in contract even absent a signed P&S contemplated by the OTP. In this circumstance, it may be inferred that the purpose of the P&S which the parties agree to execute in the OTP is to serve as a polished memorandum of an already binding contract.

Coxall v. Feldberg, Middlesex Superior Court (May 22, 2012), dealt with a transaction that where the seller had not signed an OTP or a P&S. Rather, the issue presented was whether an exchange of emails pertaining to an OTP could satisfy the statute of frauds, without a manually signed OTP or P&S. On a Thursday evening, buyer's counsel emailed to seller's counsel a proposed OTP, reserving buyers' right to comment on it, and suggesting that the attorneys work to have the OTP form finalized in time for the buyers to sign it and get the deposit check to seller's counsel by the end of the following day. The OTP attached to the email identified the property, the price and the closing date. It also referenced a financing contingency. The next day, the seller responded directly to buyer's counsel by email, stating that if there was a written approval letter from the buyer's lender by the close of business on Friday at 5 p.m., "I think we are ready to go." The emails from buyer's counsel and seller each ended with a standard signature block, with buyer's counsel's signature block identifying him and his firm, and seller's identifying his company, each followed by street address and phone number. On Friday afternoon, buyer's counsel provided a commitment letter from a lender, with a number of typical conditions.

The transaction then fell apart. Buyer promptly sought the court's endorsement of a memorandum of lis pendens under G.L. c. 184 §15. A memorandum of lis pendens, once recorded at the Registry, would make any subsequent buyer subject to the relief sought in the buyer's complaint, and likely chill a sale to any other buyer. Seller brought a special motion to dismiss the buyer's complaint, contending in part that the email exchange did not satisfy the Statute of Frauds. Quoting out of state authority, the Superior Court noted that the courts have "not yet set forth rules of the road for the intersection between the seventeenth-century statute of frauds and twenty-first century electronic mail." Calling the issue presented by the case as one of first impression, the Superior Court stated that the Massachusetts Uniform Electronic Transactions Act, G.L. c. 110G, was one attempt to provide those rules of the road to persons involved in real estate transactions.

That statute applies to "transactions between parties each of which has agreed to conduct transactions by electronic means," and under that statute, whether the parties have so agreed is "determined from the context and surrounding circumstances, including the parties' conduct." M.G.L. c. 110G §5. The court noted that in using email to conduct negotiations, the buyer and seller could be found to be in agreement to conduct the transaction by electronic means. It also noted the obvious counter argument, i.e., that the parties contemplation of a traditional hard copy offer was evidence that there was no intention to be bound. Even though the seller had never signed an OTP or a P&S, the Superior Court endorsed the memorandum of lis pendens because the complaint constituted a claim of a right to title to real estate, and denied the special motion to dismiss, effectively precluding the seller from selling to anyone but the buyer.

If persons involved in real estate transactions are going to exchange offers and purchase and sale agreements by email, they need to be cognizant of the fact that they may unwittingly subject their clients to a claim that a contract has been formed. In order to avoid this, appropriate language should be used in emails to be certain that the other party to the transaction cannot claim that there was an intention to be bound.

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The future of fee agreements

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Malonis v. Harrington and *Matter of an Attorney*. In particular, if the attorney-client relationship terminates prior to the end of a contingent fee case or the client asks for one, the lawyer must provide a written itemization of services rendered and expenses incurred within 20 days, unless the lawyer informs the client in writing that the lawyer does not intend to make a claim for fees. Comment 3C states that "in circumstances where the lawyer is unable to identify the precise amount of the fee claimed because the matter has not been resolved, the lawyer is required to identify the amount of work performed and the basis employed for calculating the fee due. This statement of claim will help the client and any successor attorney to assess the financial consequences of a change in representation."

The rule provides two forms of new contingent fee agreements. Form A is an "off-the-shelf" version, but Form B is a variant that requires a detailed explanation.

Form A, Paragraph 2 contains a standard provision that the contingency is the recovery of damages.

Form B, Paragraph 2 provides a blank space – to be filled in – as to the nature of the contingency.

Form B, Paragraph 3 contains two options for advances and payment of expenses. If the lawyer does not intend to advance expenses and collect payment only from amounts collected for the client (the first option and also the provision in Form A), the second option requires the lawyer to spell out how expenses are to be paid and collected.

Form B, Paragraph 7 B applies if the lawyer is successor counsel in a contingent fee case and also provides two options:

1. Form A states that the lawyer will be responsible for paying former counsel's fees and expenses and for resolving any disputes regarding these matters.

2. The responsibility for these matters is on the client.

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In April, REBA's board of directors voted to file a civil action against National Loan Closers, Inc., a witness closing company based in Cincinnati, for violation of the commonwealth's unauthorized practice of law statute. The action also named a Massachusetts lawyer, as well as 20 additional "John Doe" defendants, who are yet-to-be-identified Massachusetts lawyers who have performed witness closings on behalf of National Loan Closers. Here, the board, led by President Chris Pitt, discusses the lawsuit in executive session.

Regis College v. Town of Weston

A missed opportunity for the SJC to provide further guidance on the Dover Amendment

BY DANIEL P. DAIN

In coverage of the Supreme Judicial Court's recent Dover Amendment decision in*Regis College v. Town of Weston*, 462 Mass. 28 (2012), practitioners have expressed general disappointment about the lack of guidance from the court as to the contours of G.L. c. 40A, § 3. In that case, Regis College proposed an eight-building senior housing complex across the street from its main campus in Weston. Residents would be charged a returnable entrance fee of up to $1 million and would pay a monthly fee of approximately $4,000. Residents would be assigned "academic advisors" and be required to enroll in a minimum of two courses per semester.

Dan Dain

Regis College's proposal did not comply with the zoning requirements of the residential district in which the property is located. But wait, Regis said, we are a nonprofit educational corporation protected by the Dover Amendment, G.L. c. 40A, § 3, ¶ 2, which prohibits municipalities from using zoning to "prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by … a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning [certain defined dimensional requirements]." Fine, opponents replied, you are a "nonprofit educational corporation" under the Dover Amendment, but your proposed project is not a structure to be used "for educational purposes." And that was the issue in the case. Regis College is a Dover Amendment-protected institution, but did it really intend to use its senior housing development for educational purposes? The Land Court said no via summary judgment.

On direct appellate review, the Supreme Judicial Court concluded that the record was insufficiently developed at the summary judgment stage, vacated the ruling, and remanded the case for further findings as to the intended use of the proposed senior housing. The SJC tried to provide some guidance as to what use "for educational purposes" means. Looking primarily to non-Dover Amendment case law, particularly tax cases, the SJC directed that the project-proponent (the religious or educational institution) has the burden, on a case-by-case basis, of proving that a project's "primary purpose" is for a Dover-protected use (i.e., religious or educational). And, with that, the SJC left practitioners wondering what the ruling means as a practical matter.

Two aspects of the decision are particularly surprising. First, there is precedent for Regis College's proposal. It looks an awful lot like what Lasell College in Newton proposed – and received Land Court approval for – nearly 20 years ago. True, Lasell College had been moderately more specific than Regis had been in defining the educational component of the proposed senior housing. In Regis College, the SJC noted the Lasell College precedent, but provided no analysis of whether it agreed with the Land Court in that decision or whether the breadth of the educational requirements in the Lasell College plan were something of a floor (and thus a guide) for securing Dover Amendment protection for future planned developments of this nature.

Second, in setting out a vague standard for whether a project proposed by a Dover Amendment-protected institution (religious or educational) can receive the protections of G.L. c. 40A, § 3, the SJC ignored decades of Dover Amendment jurisprudence that could have provided substance to the standard. Of particular note, the SJC never mentioned the seminal *Sisters of the Holy Cross v. Town of Brookline*, 347 Mass. 486 (1964); *The Bible Speaks v. Board of*

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REBA's Condominium Law and Practice Committee meets monthly to discuss recent case law and other issues of interest to the condominium association bar. Recent meeting topics include smoke-free buildings, vexing insurance concerns and secondary mortgage market issues. In September the Committee will host a program, open to all REBA members, on pets in condominium communities with a particular emphasis on service animals. Pictured (left to right): co-chair Diane Rubin, co-chair Clive Martin, Nancy Weissman, REBA president Chris Pitt and Neil Golden.

COMMENTARY

The true price of affordable housing: A rebuttal

BY LAURENCE D. SHIND

Larry Shind

Scott Van Voorhis owes an apology to affordable housing advocates, developers and attorneys everywhere after his incendiary commentary piece, "Affordable housing, at a price," published in the May 2012 issue of *REBA News*. Far from being a "boondoogle" or a "train wreck," as he tries to categorize two worthy affordable housing projects recently completed in Worcester at abandoned former commercial buildings, the projects he writes about provided much-needed affordable rental units for inner-city residents usually left behind in the difficult and, yes, expensive business of housing creation.

Creating affordable housing units, as anyone who has worked on such projects can attest, is a time-consuming, frustrating, complex and expensive undertaking due to the myriad of regulatory and financing hurdles that must be overcome. Rather than belittling the success of the former Hadley-Burwick Furniture Store and Hammond Organ Reed Factory projects, we should be celebrating them and the residents for whom those projects provided 91 units of desperately needed housing. Mr. Van Voorhis seems to view these projects through the lens of just one set of facts – the cost per unit – but conveniently leaves out the many compelling facts and statistics about the neighborhood and residents these projects benefit.

So let's give a voice to one of those neighborhoods and projects referenced in his article. The May Street housing project was developed by a neighborhood non-profit group (the Worcester Common Ground CDC) that renovated a long-vacant and blighted historic building – the Hammond Organ Reed Factory – and provided 46 affordable rental units. The Hammond Organ Factory complex was built in approximately 1868 and contained 60,000 square feet of floor space. During its heyday in the early 20th century, it employed more than 200 people and was the largest organ reed factory in the world. Suffering the same fate as many Worcester factories and the products they manufactured, declining demand for organs eventually caused the factory to close, and the building housed a furniture company, then a storage facility, before being abandoned in 2001.

The building was purchased in 2006 by Worcester Common Ground (a CDC whose mission is to revitalize decaying inner-city neighborhoods). Their $16 million renovation project which provided 46 affordable apartments and a large community room was completed on-time and on-budget in 2008, with financing obtained (as is the norm for projects of this scope and type) from a plethora of private and public sources, including historic preservation credits, low income housing tax credits, and conventional financing. The revitalization of this historic building earned the project the Massachusetts Historic Commission's annual Preservation Award for Adaptive Reuse, Rehabilitation and Restoration in 2010. According to Worcester Common Ground, the economic profile of the typical struggling neighborhood family that now calls this apartment building home reveals a median annual household income of less than $15,000 in a neighborhood where there is an owner occupancy rate of only 10 percent! I wonder if the residents of these units would agree with Mr. Van Voorhis's assessment that the public investment in this development, and others like it, provided an "abysmal payback?"

While all of us who lend our time and expertise (often on a pro-bono basis) to developing affordable housing wish creation of housing units was the end of the story, it is not, as Mr. Van Voorhis unintentionally reveals. There are obviously many more hurdles and obstacles to overcome to stabilize inner-city neighborhoods like those in Worcester, and prevent new housing developments from being surrounded by abandoned properties and empty storefronts. But these hurdles and obstacles are not justification for abandoning attempts to provide residents of those communities with safe and affordable housing, like the units at the Hadley-Burwick and Hammond Organ buildings.

Fortunately, affordable housing advocates and developers (and their attorneys) are made of tough and determined skin, and will continue to work towards the goal of housing creation despite the many roadblocks and detours that lie ahead.

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Condo boards may restrict free speech

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sachusetts and in other jurisdictions, at least as far as reported appellate cases are concerned. The issue of free speech in a private community association setting then received nationwide attention with the New Jersey Supreme Court's decision in *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n.*, 192 N.J. 344 (2007), wherein the court upheld various restrictions on political speech by homeowners, primarily because the restrictions were viewed by the court as relatively minor and still allowed homeowners to place signs in their windows and in their flower beds. Just recently, however, in a case decided by the New Jersey Supreme Court on June 13, 2012, a near-complete ban on political signs imposed by a homeowners' association was struck down, being held as violative of Article I, Section 6 of the New Jersey Constitution, which provides that "… every person may freely speak, right and publish his sentiments on all subjects, being responsible for the abuse of that right." *Mazdabrook Commons Homeowners' Association v. Khan,* 2012 WL 2121177 (NJ).

A narrow view of these decisions might be that they were spawned by the broad, affirmative right to free speech contained in the New Jersey Constitution, which is described by that state's Supreme Court as being one of the broadest in the nation, extending beyond governmental activities and reaching strictly private conduct in certain situations. On the other hand, it could be a sign that the assertion of individual freedoms as a defense against condominium restrictions is about to greatly expand.

The *Preu* case involved a somewhat unusual set of facts at a residential condominium community in Orleans (Barnstable County), Massachusetts. The case was instituted in Superior Court by the condominium's board of managers against Preu, a resident owner, seeking recovery of costs, expenses and attorneys' fees for unit owner misconduct pursuant to M.G.L. Chapter 183A, Section 6(a)(ii), as well as an injunction against further improper contact with the condominium board members. The defendant had developed an extremely antagonistic relationship with not only the association's president and property manager, but also with at least a couple of his neighbors. His displeasure was manifested by way of loud and profane language, posting notes and signs in the common areas, writing insulting and derogatory notes on checks payable to the condominium, and "flipping the bird" to various individuals and to security cameras. He even went so far as to leave bags filled with dog feces at the door of the association president (claiming that he was simply returning it to its rightful owner, since he said that the president did not properly clean up after his dog). After issuing a series of warnings, the association finally lost all patience and filed suit, seeking damages, attorneys' fees and injunctive relief. During the course of the Superior Court trial, the judge raised the issue of the defendant's constitutional right of free speech, eventually ruling against the association with respect to certain aspects of the defendant's conduct. That decision was then affirmed in part and vacated in part by the Appeals Court.

First, and most notably, the Appeals Court held that judicial enforcement actions involving speech in a private condominium setting constitute sufficient state action to bring constitutional protections into play, citing the U.S. Supreme Court case of *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). Having found that freedom of speech applies, seeking injunctive relief against such conduct in the future would constitute an unlawful prior restraint. The court did, however, attempt to emphasize the narrowness of its decision, specifically stating that certain condominium restrictions on speech and expressive conduct may indeed be enforceable, presumably on a case-by-case basis. The court held only that, when action is brought claiming that the breach of such restrictions amounts to misconduct under Section 6 of Chapter 183A, those restrictions are subject to scrutiny under the First Amendment.

The long-range implications of the *Preu* decision remain to be seen. Given the express limitations of the holding, I believe that reasonable "time, place and manner" restrictions on speech would still be upheld, much like they were in the *Twin Rivers* decision in New Jersey. The *Preu* court also noted that no decision was being made as to whether a unit owner could be deemed to have waived his or her free speech rights by purchasing a home subject to previously-recorded restrictions on speech and expressive conduct. The New Jersey Supreme Court rejected such a waiver argument in the *Mazdabrook* case, but the Massachusetts Appeals Court in *Preu* has left that question for another day.

Notwithstanding the limited holding of the *Preu* case, one thing is abundantly clear: Pandora's Box has now been opened with respect to the assertion of constitutional freedoms as a defense to covenant enforcement at private community associations in Massachusetts. Future disputes could involve any number of claims of individual freedoms: the posting of a sign, the hanging of a flag, or the erection of a religious display, to name but a few. Community associations and their attorneys might respond by drafting and implementing more detailed provisions which regulate these activities as to time, place and manner, while still allowing them to a certain extent, in order to withstand constitutional scrutiny. In light of these recent decisions, however, the enforcement of various types of rules and restrictions may no longer be taken for granted.

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Regis College v. Town of Weston

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Appeal of Lenox, 8 Mass. App. Ct. 19 (1979); the famous footnote 6 of *Trustees of Tufts College v. Medford*, 415 Mass. 753 (1993); or *Martin v. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141 (2001). Together, these cases show the unease that courts have had with municipalities becoming overly entangled in land use planning decisions for religious or educational institutions. For example, in *Bible Speaks*, the Appeals Court found that the Dover Amendment protections extended to lighting and a snack bar for a softball diamond on the campus of a non-profit educational institution. The Appeals Court also struck down a site plan review requirement, writing language that I find the most fascinating in all of Dover Amendment jurisprudence: "By reliance on the criteria spelled out in the informational statement, the board is essentially attempting to exercise planning board functions and pursuing its own notions of land use planning, and to the extent that those notions become inconsistent with the presence or expansion of educational institutions within the town, the board will be able to fashion restrictions that subordinate the educational use to the board's planning goals."

This unease with having municipalities (and ultimately courts) decide for Dover Amendment-protected institutions whether specific land use decisions made on their own properties advance a religious or educational purpose reached its greatest expression in *Martin*. That case featured a Superior Court judge consulting Mormon doctrine and history to determine whether the existence and size of a proposed temple steeple could be considered "religious" vs. secular. In reversing, the SJC observed in another great line: "It is not for judges to determine whether the inclusion of a particular architecture feature is 'necessary' for a particular religion. A rose window at Notre Dame Cathedral, a balcony at St. Peter's Basilica; are judges to decide whether these architectural elements are 'necessary' to the faith served by those buildings?"

But there is a big difference between a school making its own land use decision with respect to a snack bar at a softball diamond, and a college proposing an eight building senior housing complex in the middle of suburban Weston. Regis College's broad proposal even left many Dover Amendment advocates troubled. Was the school trying to use the Dover Amendment as a shield for revenue-generating real estate development? Would sanctioning the Regis College proposal open the door to future Dover Amendment abuse?

But even if the criticisms of Regis College's motivations are well-founded, should we be concerned? In these tight economic times, if the revenue generated by such projects (e.g., future senior housing developments) goes to the non-profit educational institution to support the institution's main mission – by helping to pay teachers, staff, other capital needs, keeping tuition lower, etc. – should we question that the mechanism that generates the revenue, on the school's campus, might not be strictly educational itself? And, importantly, who should make these calls – the schools and churches, or the municipalities and courts? One can see the practical difficulty of making the municipality and courts the arbiters of what qualifies as "primarily educational," rather than leaving this within the sound discretion of the schools themselves. The court in *Bible Speaks* was not troubled by a softball diamond, physical education being understood to be a part of the overall educational mission. By this reasoning, it would seem that a small football stadium at a Division 3 school would also qualify as educational. But what about a big stadium proposed by a Division 1 school? This is not an idle question as Umass Amherst makes the jump to Division 1, with its associated requirements for stadium capacity. Is the primary purpose of a big-time football stadium educational or revenue generation? Is this a subjective or objective question (if subjective, would there be depositions of school authorities over their priorities)? Do we want municipalities and courts making these land use decisions? Another important point to keep in mind: whether a proposed structure on a Dover-Amendment protected institution's property is itself entitled to Dover Amendment protection is only the first question of the Dover Amendment analysis (after the question of whether the institution itself qualifies for Dover Amendment protection). As G.L. c. 40A, § 3, ¶ 2 states, such structures are still subject to reasonable dimensional regulation. Isn't that really where Regis College's proposal should be evaluated – whether Weston's residential dimensional requirements can reasonably be applied to the school's proposal – as opposed to whether the proposed use of the structures is primarily educational in the first place?

These are important questions. There are a lot of Dover Amendment-protected institutions who own a lot of land in the commonwealth. By stating a vague standard while ignoring many important precedents, the SJC missed an opportunity to provide content and guidance to the stakeholders in these debates. That is unfortunate. By not providing clear standards, the SJC may have invited a return of this case to the court some years in the future, after the Land Court decides the case on the merits following remand.

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'Bad boy' guarantees may be triggered by insolvency

BY ANTHONY B. FIORAVANTI

An appellate court has concluded recently that language used in many non-recourse commercial real estate loan agreements triggers full recourse liability whenever the borrower becomes insolvent. Because guarantees are only called upon when a borrower is insolvent, this holding threatens to transform many non-recourse loans into de facto full recourse loans and to upend the relationships between commercial real estate lenders and borrowers.

Anthony Fioravanti

THE RISE OF NON-RECOURSE LENDING

Most modern commercial real estate loans are now made on a non-recourse basis by which the lender agrees that if the borrower defaults the lender's sole remedy is to foreclose and take back the property. The essential bargain between lender and borrower is that the lender agrees not to pursue recourse liability directly or indirectly against the borrower or its owners, provided that the lender can comfortably rely on the assurance that the financed asset will be "ring-fenced" from all other endeavors, creditors and liens related to the parent of the property owner or affiliates, and from the performance of any asset owned by such parent entity or affiliates. It is not just the isolation of the real property asset, but the isolation of the cash flows coming from the operation of the real property, from which debt service is paid on the mortgage loan and is subsequently distributed to the holders of securities backed by such mortgages.

The lender thereby accepts the risk of a borrower's insolvency, inability to pay or lack of adequate capital after the loan is made. Typically, the lender requires that the borrower be a single purpose entity created to own and manage the one commercial property. This structure prevents the borrower from commingling assets which might reduce its ability to repay the loan and isolates the lender's security from other creditors.

For its part, the borrower also agrees not to engage in "bad boy" conduct, such as making misrepresentations in connection with obtaining the loan, misapplying the rental payments, transferring or encumbering the property securing the loan, filing for bankruptcy, or other deliberate and intentional activities that would threaten the lender's security or interfere with its ability to enforce its collateral.

To help ensure that the borrower does not misbehave, the lender requires a creditworthy guarantor (usual a principal or managing member of the borrower) to provide a guaranty of the borrower's liability. If the borrower engaged in any "bad boy" activities, generally understood to be intentional and deliberate acts, the guarantor would become personally liable for the full amount of the unpaid loan.

A recent appellate court decision from Michigan turns this recourse loan structure on its head.

THE *CHERRYLAND* DECISION

In *Wells Fargo, N.A. v. Cherryland Mall Limited Partnership*, the owner of Cherryland Mall in Traverse City, Michigan, received an $8.7 million nonrecourse mortgage loan. One of the covenants in the loan agreement, which appears as standard language in many loan agreements, was that the borrower would not "fail to remain solvent or pay its own liabilities." A guaranty from a Cherryland principal provided that the loan became fully recourse if the borrower violated any of the "bad boy" covenants.

Because of the economic downturn, the borrower defaulted and became insolvent. Following a foreclosure, there was a deficiency of $2.1 million. Wells Fargo sued the borrower and guarantor, arguing that the guarantor was liable for the deficiency because the borrower breached the covenant requiring it to remain solvent and pay its debts as they became due. The trial court agreed and entered a judgment for the full amount of the deficiency against the guarantor.

On appeal, the guarantor argued that the parties did not intend to make the loan fully recourse as to the guarantor unless the borrower became insolvent as a result of its intentional or willful bad acts. He noted that Cherryland's inability to make its loan payments did not result from any willful or intentional "bad act." The guarantor also warned that allowing the loan to become fully recourse simply because the borrower was insolvent was against public policy and could lead to "economic disaster for the business community."

The appellate court rejected these arguments. The court stated that is must "give effect to every word, phrase, and clause in a contract and avoid an interpretation which would render any part of the contract surplusage or nugatory." The loan documents did not specify that full recourse liability would be imposed only as a result of the borrower's intentional or deliberate act. Instead, the documents stated, "any failure to remain solvent, no matter what the cause, is a violation" of the loan covenants. The court dryly observed that "[i]t is not the job of this Court to save litigants from their bad bargains or their failure to read and understand the terms of a contract."

The court did acknowledge that its construction of the covenant "seems incongruent with the perceived nature of a nonrecourse debt" but rejected the guarantor's public policy argument as well, holding that it was up to the Michigan legislature to address matters of public policy.

The case has been appealed further to the Michigan Supreme Court.

CONCLUSION

The potential impact of the *Cherryland* decision, if upheld on further appeal and adopted by other jurisdictions, is immense. Because most of these loans are part of a commercial mortgage-backed securities pool, very little can likely be done now to amend the language of individual agreements. Nevertheless, lenders, borrowers, and guarantors should review their agreements to determine if they are at risk. For any new loans, borrowers and their counsel need to review any covenants carefully to ensure that they are drafted narrowly to avoid such unintended results.

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Foreclosure attorneys fend off claims from borrowers

BY ROBERT T. GILL AND JENNIFER L. MARKOWSKI

The all too familiar foreclosure troubles of recent years continue to the present. On the one hand, mortgage defaults persist. Foreclosure petitions and the filing of foreclosure deeds are up this year as compared to the same time last year. On the other hand, borrowers continue to scrutinize and challenge lenders' documentation – with some success – calling into question their right to foreclose. The result is often protracted litigation between the borrower and the lender that can languish for years and involve multiple courts. These days, litigation between the borrower and lender is expected. What is unexpected is when the borrower asserts a claim against the attorney conducting the foreclosure.


Bob Gill


Jen Markowski

In our experience, a claim by the borrower against lender's counsel conducting the foreclosure typically emanates from the borrower's complaints about the lender. The complaints tend to fall into one of two categories: 1) the borrower contends the lender does not or did not have standing to foreclose; or 2) the borrower contends the lender failed to follow the statutorily required perquisites to foreclosure. With the first complaint, the borrower often contends the foreclosure attorney knew or should have known that the lender did not have standing and therefore wrongfully foreclosed. With the second complaint, the borrower contends there was an error in the foreclosure procedure yet the foreclosure attorney persisted to foreclose when he or she knew or should have known the sale would be defective.

In some cases the borrowers raise valid challenges to the foreclosure process, but in many the complaint is raised to delay the inevitable. Often the borrower's first response to a foreclosure petition is to file for bankruptcy. The bankruptcy proceeding temporarily delays the foreclosure, but the lender can move for relief from the bankruptcy stay, which the borrower often opposes by challenging the lender's standing.

Whether or not the borrower files for bankruptcy, he or she often files suit against the lender. If there is a pending bankruptcy, the borrower may file an adversary proceeding asserting independent claims against the lender such as fraud, breach of contract, wrongful foreclosure, misrepresentation, and the like. If there is no bankruptcy or if the borrower's efforts to oppose a stay are unsuccessful, the borrower may file suit in state or federal court raising the same arguments. In each of these venues, we have seen the borrower add the foreclosure attorney as a defendant claiming the attorney knew or should have known the foreclosure was defective.

Absent evidence of fraud by the foreclosure attorney, these types of claims tend to be susceptible to a variety of defenses that can be successfully asserted in an early dispositive pleading.

First, a claim that the attorney was negligent for failing to ascertain that the lender did not have standing typically lacks legal basis because attorneys generally do not owe a duty to a non-client. This general rule has been repeatedly recognized in the context of real estate transactions. Thus, the first defense to a claim that the foreclosure attorney knew or should have not known that the its clients did not have standing to foreclose, is that the foreclosure attorney did not owe a duty to the borrower and therefore the borrower cannot pursue a claim for negligence.

Second, to the extent the attorney's alleged misrepresentations about its client's right to foreclose occurred in the scope of the legal proceedings, the litigation privilege may provide protection. Statements made by an attorney in connection with a judicial proceeding, even if they are false, are absolutely privileged. See*Sriberg v. Raymond*, 370 Mass. 105, 108 (1976). The privilege, which applies to communications with prospective parties to an action that is only contemplated, promotes attorneys' ability to freely express themselves while protecting their clients' best interests.

Third, in cases where the borrower's suit appears to be a delay tactic rather than to redress a legitimate controversy, a motion under the Anti-SLAPP Act, G.L. c. 231, § 59H, may also be appropriate. To avoid dismissal pursuant to an Anti-SLAPP "special" motion to dismiss, the borrower must present evidence that: 1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law; and 2) the moving party's acts caused actual injury to the responding party. The Massachusetts Appeals Court has recognized that the protections afforded by the statute extend to the attorney representing the petitioning party. *Plante v. Wylie*, 63 Mass. App. Ct. 151, 156 (2005). The benefit of an Anti-SLAPP special motion to dismiss is that the moving party is entitled to recover attorney's fees if successful.

Fourth, to the extent the borrower is incorrect as to whether the lender had standing or the proper procedure was followed, his or her claim would also fail. In fact, in some cases, judges have dismissed the claims without reaching the merits of the defenses because it is apparent from the pleadings and supporting documentation that the lender had standing.

Finally, where a judge has adjudicated the issue of standing, the borrower is barred from relitigating the claim in another venue.

Fortunately, there are a variety of defenses available and these kinds of claims are typically disposed of quickly. Since there can rarely be grounds for a borrower to pursue a claim against the foreclosure attorney, it would be reasonable to expect them to rarely arise. Unfortunately, they occur too often with little or no support. While we have not yet seen a judge award a foreclosure attorney his or her attorneys fees under either the Anti-SLAPP Act or G.L. 231, § 6F, perhaps it is only a matter of time before someone is penalized for pursuing frivolous litigation.

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REBA launches new affinity partnership for professional liability insurance

REBA has appointed the Herbert H. Landy Insurance Agency Insurance Agency, Inc. as the Association's exclusive affinity partnership to provide professional liability insurance to REBA members on a preferred basis.

"Landy will provide a high level of service as well as preferred premium pricing to our members throughout the Commonwealth," said REBA President Chris Pitt. "We are delighted to partner with them and we know they will serve our members, particularly small firms and sole practitioners, very effectively."

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The Herbert H. Landy Insurance Agency, located in Needham, was founded in 1949 as a general business insurance agency. Since 1962, its primary focus has been on providing insurance services that include professional liability insurance, business owners' liability packages, workers compensation and risk management programs to lawyers, accountants and real estate professionals. As agent for multiple carriers, Landy can examine the specific needs of each REBA members and tailor the policy and the coverage to fulfill those needs. For more information, contact John Torvi, vice president of sales, at 781-292-5417 or at johnt@landy.com. Additional information is also available at www.landy.com; watch for further updates and information specifically for REBA members.

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