President Pitt bids a fond farewell.
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Judge Kass presents Richard B. Johnson Award.
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Secure Settlements is betting on vetting

Company offers vetting process and listing in database – for a fee

BY JOEL A. STEIN

JOEL STEIN

The Consumer Financial Protection Bureau (CFPB) issued CFPB Bulletin 2012-03 on April 13, 2012, which notes that the CFPB "expects supervised banks and non-banks to oversee their business relationship with service providers in a manner that ensures compliance with federal consumer financial law, which is designed to protect the interests of consumers and avoid consumer harm."

The bulletin further states that the CFPB's expects "supervised banks and non-banks to have an effective process for managing the risks of service provider relationships." The steps include, but are not limited to:

- Conducting thorough due diligence to verify that the service provider understands and is capably of complying with federal consumer financial law.
- Requesting and reviewing the service provider's policies, procedures, internal controls and training materials to ensure that the service provider conducts appropriate training and oversight of employees or agents that have consumer contact or compliance responsibilities.
- Including in the contract with the service provider clear expectations about compliance, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities, including engaging in unfair, deceptive or abusive acts or practices.
- Taking prompt action to address fully any problems identified through the monitoring process, including terminating the relationship where appropriate."

Enter Secure Settlements, Inc., whose founder, Andrew Liput, claims to have spent 10 years in the planning of his company, which, according to his website, will "shut the door on closing fraud." He further states that for "closing agents, attorneys, escrow and title agents, notaries and independent closers," a 10-minute application and 30-minute vetting process results in a listing in SSI's searchable database, used by hundreds of banks and

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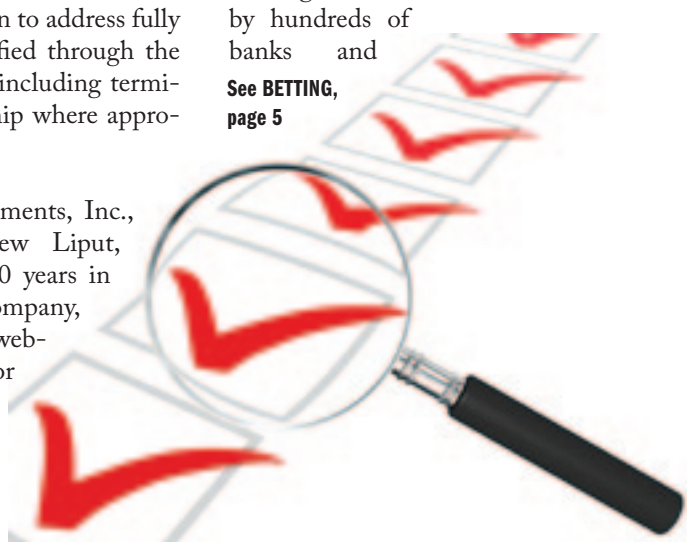

PRESIDENT'S MESSAGE

Excellence in 2013

BY MICHAEL D. MACCLARY

MIKE MACCLARY

I am very excited about the challenge of being president of the Massachusetts Real Estate Bar Association for 2013. I have had the wonderful opportunity to train for this position under our outgoing president, Chris Pitt, and his predecessors. They have armed me with the skills and information necessary to lead the finest real estate attorneys in the nation! By co-chairing the REBA Continuing Education Committee and then spending the last five years on the REBA Board of Directors, I have worked with the best and, in turn, have gleaned more about REBA's mission than I ever could have imagined.

As I mentioned briefly at our Annual Meeting in November, my theme for 2013 is "Excellence." I believe that the goal of the membership of REBA is to provide education, guidance and industry standards and a standard set of forms for the day-in, day-out use of conveyancers. These templates for deeds, trusts, mortgage discharge and many other transactions helps our member attorneys maintain a standard of excellence, leading in turn to the delivery of excellent results for our clients. This is why we have attorneys volunteer to teach breakout sessions at our annual conferences. This is why we are so ardently fighting against

See EXCELLENCE page 2

Reck receives REBA's highest honor at annual meeting

Joel Reck received the Richard B. Johnson award, REBA's highest honor, at the association's annual meeting and conference on Oct. 29, 2012. The Johnson Award is a lifetime achievement award for Massachusetts real estate lawyers. Pictured (left to right): Hon Rudolph Kass, who presented the award; Reck; and REBA president Chris Pitt.

Author an article for *REBA News*

REBA News welcomes article submissions from any REBA member. Your article does not need to be in perfect final text, as our professional editors and proof-readers vet every submission. The copy deadline for the March/April issue is Friday, Feb. 15. Be sure to include your photo and a brief précis about your practice. We prefer articles of 700 to 1,000 words.

2013 president puts forth call for excellence in coming year

CONTINUED FROM PAGE 1

the unauthorized practice of law in Massachusetts, which can lead to legal and financial pitfalls for homebuyers, home sellers and borrowers in the name of saving a few dollars at closing. Buyers who enlist the aid of a non-attorney are missing out on the legal protection provided by the ethical, moral, legal and regulatory guidance and responsibility that lawyers provide – and which non-lawyers cannot and do not.

Our standards for excellence has led to judges of the Land Court asking us for guidance in formulating new initiatives, including the Limited Attorney Representation program kicking off in January. This is why the Massachusetts IOLTA Committee looks to REBA to support some long-awaited changes to their regulations. This is why other bar associations across the country are looking to REBA for advice about how to deal with witness-only closings, which pose a risk to buyers and sellers due to the lack of legal certification of proper ownership.

We are a group of attorneys who care about what we do and how it affects consumers every day. So, please join me in striving for Excellence in 2013. Whether it means taking an additional five minutes to reread an agreement before it is sent out for comment, or making sure a client is satisfied with the terms of a transaction before it is papered, please think about what more you can do to ensure that a deal is done properly and your clients can say that their attorney did a excellent job for them. This is what my predecessors have taught me and I can only hope to continue their tradition of maintaining REBA's reputation as the leader of the real estate industry!

Mike MacClary is 2013 president of REBA and a partner at Burns & Levinson, LLP. He can be reached at (617) 345-3305.

Michelle Simons, residential conveyancing committee co-chair, and Ed Bloom, former REBA president, lead the applause as President Chris Pitt hand over the presidential gavel to incoming 2013 REBA President Mike MacClary. MacClary is a partner in the Boston office of Burns & Levinson LLP. Simons, a partner in the Newton law firm of Brecher, Wyner, Simons, Fox & Bolan, LLP, is the association's 2013 president-elect and will become REBA's president the following year.

President Pitt says farewell, but not goodbye

BY CHRISTOPHER S. PITT

CHRIS PITT

New Year's Eve, 2012 — In my final utterance as the President of REBA, I want to thank the many people who have made the yoke of this office an easy one, and the burden of its time commitment a light one.

First, the 31 members of the Board of Directors, each an experienced real estate professional, dedicated to this association, each bringing a unique talent and interest to the deliberations of the board and the betterment of our profession. I thank them for the efficiency of their deliberations, allowing me to conclude each board meeting no later than 6 p.m., just in time to make my weekly Wednesday night Ultimate Frisbee game.

Second, REBA's well-oiled administrative machine, including Andrea Morales, with a smile and a pleasant word for everyone who visits REBA-HQ in person or by phone; Bob Gaudette, master of REBA's online presence; Mark Gagne, manager of REBA's budget – all directed by our patient and resourceful COO, Nicole Cunningham.

Third, REBA's well-respected legislative counsel, Ed Smith, whom I have been honored to get to know better during this past year. Seeing him operate behind the scenes – informing the deliberations of REBA's Legislation Committee and board, patiently advising the officers and other REBA representatives, whom he accompanies to negotiating sessions with state legislators, navigating the corridors of the State House, and the conversations of innumerable legislative fundraisers – I have come to appreciate what he means to REBA. Ed is a fountain of legislative and political wisdom and primarily responsible for the high regard in which REBA is held on Beacon Hill.

Finally, Executive Director Peter Wittenborg, who not only daily applies his decades of real estate practice and political experience to the betterment of REBA, but has been to me a tutor and a coach, an invaluable source of both encouragement and perspective. My gratitude to Peter knows no bounds.

REBA continues to be an important and meaningful institution for the Massachusetts real estate bar. It has been my great privilege to serve it and you, its members. I encourage you to be active constituents, and to encourage your colleagues to be active as well. Join a committee. Attend the semi-annual conferences. Write an article for *REBA News*. Take advantage of the services offered by REBA's affinity partners. Share your own real estate practice experience with others. A dynamic bar association helps to ensure a strong profession. Be a part of it.

Happy New Year!

Chris Pitt, REBA's immediate past 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 reached 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 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

The most important closing of my life

BY PAUL F. ALPHEN

PAUL ALPHEN

I recently read that the average American moves 14 times in a lifetime. My mother lived in her house in Wayland for 46 years. I went to the closing on her house today and a nice young couple with young kids will now begin to create their own collection of memories within. A lot happens in 46 years. We have memories of 46 Christmases, countless birthdays, plus Mother's Days, Father's Days, graduation celebrations and all the other important family events that naturally gravitate to the home of the matriarch and patriarch of the family. You could not calculate the number of meals served, or the number of times I mowed the lawn.

We went from coloring books and train sets to automobiles and universities. We learned how to barbeque chicken and broil haddock. It is where I tormented my sisters. It is where I painted a house for the first and last time in my life. We also learned how quickly the fire department can arrive when summoned, and how the neighbors can report on the parties that occurred when our parents were away.

The house was more than a home. It was the office of our parents' insurance business. It was a function hall, when called upon to be the site of my sisters' wedding receptions and my rehearsal dinner. It was the headquarters for numerous political campaigns. It was a police substation when my buddies in the department would stop by to eat at all hours of the day and night. It was a garage, where Stevie, Dougie, Jeff and I graduated from oil changes to racing engines armed with nothing more than a Chilton's Manual and some Craftsmen tools. It was a boat yard. It was an all-day diner. It was our hangout.

We made lifelong friends in the neighborhood. We made lifelong friends in the town. The house is an indelible part of our personalities.

It was the place where each of us introduced our mother to our future spouses. It was where we received neighbors, relatives and friends after our dad died in 1973. It was where our children played with their cousins, and

See CLOSING, page 8

LOOKING AHEAD

A preview of MassDEP's proposed regulatory reform measures

BY NATHANIEL STEVENS

NATHANIEL STEVENS

The director of the Massachusetts Department of Environmental Protection (MassDEP) Wetlands and Waterways Program, Lealdon Langley, recently presented to members of the REBA Environmental Committee a preview of the results MassDEP's ongoing Regulatory Reform Initiative. He discussed the principles and underlying goals of the draft regulations to be issued soon for public comment.

Building on Gov. Deval Patrick's first-term challenge to all agencies to improve their performance, in spring 2011 MassDEP Commissioner Ken Kimmell launched MassDEP's Regulatory Reform Initiative, shortly after he was appointed at the start of the governor's second term.

MassDEP's program staff, legal personnel, senior managers and many outside stakeholders reviewed all of MassDEP's programs for opportunities for shorter and simpler procedures, streamlined approvals, predictable actions, and even elimination of some types of MassDEP permits.

The Regulatory Reform Initiative partly is driven by the decrease in MassDEP's budget over recent years. Since 2002, MassDEP's budget has been cut by the Legislature from approximately $65 million to $46 million, resulting in a reduction of staff from 1,200 full-time equivalents to approximately 840 today.

Kimmell issued a draft action plan in March 2011 to gather ideas for reforms that later would be used to draft revised regulations and change policies and procedures. Stakeholder groups were formed and met over a six-month period to assist MassDEP in generating ideas for the initiative. The commissioner established the following parameters for this process:

- No weakening of environmental standards.
- Any change can be handled within existing budget and staffing levels.
- Any change will result in some time savings for MassDEP.
- All identified reforms can be implemented by MassDEP without a need for legislative/statutory change.
- No transfer of responsibilities to municipalities.
- No changes will alter obligations under existing federal funding agreements.

Applying these principles, MassDEP selected the reforms it would act on by revising regulations in a variety of program areas, streamlining certain programs and permitting processes, creating some permits-by-rule (or self-certifying permits), and identifying areas needing more substantial (statutory) reform. A final action plan was announced in March 2012.

Since then, MassDEP developed 16 packages of proposed regulatory changes now undergoing final internal review. Langley provided the Environmental Committee an overview of the 10 packages for which his program was responsible. He noted that each reform is meant to "disinvest" MassDEP staff from low-value activities that provide little environmental protection or public health benefit, or to "incentivize" good behavior like renewable energy development, ecological restoration, or pilot technology projects.

WETLANDS PROTECTION

The proposed regulations will provide coastal dredging projects with a consolidated, single application for Wetlands Protection Act approval, Chapter 91/Waterways permit and Water Quality Certification. These projects also might receive a single, consolidated permit. A similar consolidated application process will be proposed for piloting of new technologies, such as testing of or data collection for new renewable energy technologies.

Renewable energy projects will receive favorable treatment with the creation of another "limited project" category in the Wetlands Regulations. Many such projects, like wind farms, require roads for construction and maintenance that cross streams and wetlands. MassDEP and the stakeholder group felt that these roadways do not fit the existing limited project provision in the Wetlands Regulations, 310 CMR 10.53(3)(e), so a new category has been developed.

See MASSDEP, page 11

Washington insider Steve Gottheim addresses REBA at annual meeting and conference

Steve Gottheim, legislative and regulatory counsel for the American Land Title Association, delivered the luncheon keynote address at REBA's annual meeting and conference last October. Gottheim offered luncheon attendees an unsettling overview of the rule proposed by the Consumer Financial Protection Bureau for integrated mortgage disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth-In-Lending Act (Regulation Z). The rule, if adopted, would totally overhaul the federal regulation of residential real estate lending nationwide.

Limited appearance representation in the Land Court

BY HON. ROBERT B. FOSTER

ROBERT FOSTER

The Land Court is pleased to announce the issuance of Standing Order 1-12, Limited Appearance Representation, effective Jan. 2, 2013. Limited appearance representation (LAR) allows qualified attorneys to appear in a case for a single event, or even to prepare pleadings on behalf of clients without filing an appearance. The Land Court, like the other trial courts in the commonwealth, has seen an increase in the number of unrepresented litigants in recent years. These *pro se* litigants are usually people who cannot afford to hire an attorney to represent them through the entire case. With LAR, they will be able to engage an attorney at a lesser fee for part of the case – a crucial event like the case management conference or a motion to dismiss – and thereby get representation they wouldn't otherwise have, at a cost they can afford. The advantage of LAR for attorneys is that it opens up a whole new group of potential clients – people who previously would not hire an attorney at all.

The Land Court invites REBA members to consider LAR representation for their clients. To appear as an LAR attorney, you must be qualified by completing an approved training program. The training is important. It outlines the kinds of discussions and agreements you must have with your client to ensure that she fully understands and agrees to the limited scope of your representation. The court is working with REBA to create LAR training tailored to Land Court practice, which will, we hope, lead to the establishment of a REBA referral list of qualified attorneys who can take on LAR representation in the Land Court. We are confident that you, like us, will find that LAR is a win-win opportunity to provide paid representation to parties who would otherwise never hire an attorney but appear *pro se*.

Judge Foster was appointed to the Land Court bench as an associate justice in 2011, succeeding Hon. Charles W. Trombly. Prior to his appointment to the bench, Foster was a shareholder in the Boston firm of Rackemann Sawyer & Brewster PC.

Secure Settlements is betting on vetting

CONTINUED FROM PAGE 1

mortgage lenders and (beginning January 2013) tens of thousands of consumers to research the risk status of their transaction partners.

The fee for being listed has been stated to be $299.

SSI is selling itself to warehouse lenders across the country and is in fact using the CFPB bulletin to gain business and legitimacy.

A letter from the National Association of Independent Land Title Agents to Richard Cordray, director of the CFPB, references a meeting with representatives of the CFPB on Oct. 1, 2012, where it was disclosed that the CFPB understood that:

- "the service protection bulletin was not meant to address the title insurance industry, specifically.
- the CFPB understood that there were already protections and due diligence measures in place in our industry that met most, if not all, of the concerns addressed in the service provider bulletin.
- the CFPB may issue supplemental guidance to address the concerns raised by the settlement service industry to the confusion caused by third-party vetting companies and their supporters."

For Secure Settlements, Inc., and other companies that will follow its model, this is seen as an opportunity to develop a niche in the profitable real estate market. Unlike a title insurance company audit, SSI will conduct a 30-minute vetting process and obtain the necessary information to have an agent (or notary!) listed in its database. The listing in the database will allow SSI to check the agent for judgments, bankruptcies, federal tax liens, lawsuits, failure to renew license or any other matter that might raise a red flag.

As Wayne Doctor, the COO of SSI, said in a conference call with members of the Real Estate Bar Association last month, "Every single day, somewhere in this country, some escrow agent, notary or title agent is being indicted for mishandling funds." For a fee paid by the agent and the listing in a database, SSI feels confident it can provide consumers and lenders with greater protection.

THANKS, BUT NO THANKS

Last December, REBA voiced its opinion to the CFPB concerning Bulletin 2012-03. The letter accented the redundancy of the service offered by SSI. In Massachusetts, title insurance agents are, for the most part, attorneys, licensed and under the purview of the Board of Bar Overseers. In addition, title insurance agents are audited on an annual basis, which ensures that the agent is maintaining current errors and omissions coverage, malpractice and fidelity insurance policies and surety bonds in accordance with state and underwriter requirements. Insurers also require that agents maintain a file storage system that adequately safeguards the closing files and escrow records; maintain a document retention program; maintain procedures to ensure compliance with the underwriter's contract; and design an accounting process with the appropriate level of internal controls and management oversight.

A title insurance audit will further include the review of preselected closing files to determine that the agent has followed all lenders closing instructions, and will show that all disbursements have been made, the Good Fund Statute has been complied with, all commitment requirements have been satisfied and all documents have been recorded.

In recent years, audits have become more involved and in depth. This is most certainly a result of economic difficulties, but could also be the result of parent companies who have been concerned with the increase in fraud and theft by settlement agents.

In addition, lenders have the benefit of the closing protection letter, issued by the title insurance company to an agent whose contract is current; the customer named in the letter is guaranteed reimbursement for losses incurred (under certain conditions).

'GOOD APPLES?'

SSI argues that "licensing is not vetting," and that licensing bodies do not and cannot actively monitor a licensee's activity. They also argue that agents should want to be vetted, as it will demonstrate that they are the "good apples."

Several of the arguments pushed by Secure Settlements are persuasive. Defalcations, fraud and theft by settlement agents are on the rise. Should lenders risk wiring hundreds of thousands of dollars to agents across the county? Should the "good apples" be willing to pay for the privilege of having themselves an additional level of investigation and supervision? And will the product offered by SSI effectively uncover those who will sometime in the future commit an act of theft or fraud? Should someone be removed from an "approved" list because of a judgment, a federal tax lien or a snafu in state licensing? How about a divorce judgment? And what's next – will there be a push to check agents for evidence of addictions, such as alcoholism or gambling? Should agents be subject to urine testing?

I remain skeptical as to what the product offered by Secure Settlements can achieve in uncovering those who will sometime in the future do harm.

For now, two of the larger warehouse lenders, First Tennessee and Texas Capital Bank, both of whom had previously stated that they would rely on SSI to review and certify settlement agents effective Jan. 1, 2013, have now postponed the implementation of the evaluation process until further notice.

Stay tuned for the vetting debate. And feel free to let your congressmen, the CFPB and your lenders know your feelings.

Joel Stein serves as co-chair of REBA's title insurance and national affairs committee and is a frequent commentator in these pages on title insurance matters. He can be reached at jstein@steintitle.com.

Appeals Court casts aside side agreement

BY DOUGLAS W. SALVESEN

DOUG SALVESEN

In a recent decision, the Appeals Court held that a purchaser of commercial property that is subject to a lease cannot "cherry pick" the lease obligations that it would assume upon the purchase. The Appeals Court concluded that the side agreement between the seller and the purchaser which divvied up the lease obligations between them was not binding on the lessee. *Bright Horizons Childrens Centers, Inc. v. Sturtevant, Inc.*, 82 Mass. App. Ct. 482, 975 N.E.2d 885 (2012).

Our client, Bright Horizons Childrens Center, Inc., had entered into a lease with 400 Longwater Realty, LLC. The lease required Longwater to construct a building on property owned by Longwater in Norwell. Before the construction was fully completed, Longwater sold the property – and the lease – to Sturtevant, Inc.

Sturtevant, a manufacturer of material processing equipment based in Hanover, had recently sold its industrial warehouse. It purchased the Norwell property and the lease for tax purposes. However, Stutevant had no desire to be responsible for the completion of the building and the attendant risks. To avoid them, Sturtevant entered into a side agreement with Longwater whereby Longwater agreed to retain them.

After the sale of the property, the construction of the building dragged on. Deadlines passed. Costs escalated. Longwater, which had run out of money, ran off the job. Bright Horizons stepped in and completed the work. The bill for that work was sent to its new landlord, Sturtevant. Relying on its side agreement with Longwater, Sturtevant refused to pay for the construction costs. Litigation ensued.

At trial, the Superior Court instructed the jury that Sturtevant could only be held liable for those lease obligations that it had agreed to accept. Following this instruction, the jury found that Sturtevant was not responsible for the construction obligations in the lease. An appeal ensued.

On appeal, the Appeals Court held that the jury instruction was error. The "ancient rule," followed in Massachusetts, is that a successor lessor "stands in the shoes of and has the same rights and duties under the lease as had been held by its predecessor." Any modification of those rights and duties could be made only with Bright Horizons's express consent.

Sturtevant conceded as much. It argued, however, that Longwater had the obligation to obtain such consent. Sturtevant contended that it had no such obligation and could not be held liable for Longwater's failure to obtain Bright Horizons's consent. The Appeals Court rejected that argument. The Appeals Court also rejected the argument that Bright Horizons had waived any right to object to the side agreement by not asking if it existed. The court noted that any waiver would have had to be set forth in a written instrument signed by Bright Horizons, "which obviously does not exist here."

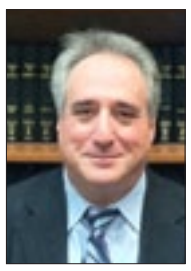
Concluding that the side agreement was "a nullity vis-à-vis Bright Horizons," the Appeals Court vacated the judgment, set aside the jury's verdict, and ordered that judgment be entered for Bright Horizons. This decision reaffirms the "black letter law" that one party to a lease cannot modify the rights or duties of a counter-party by unilateral action.

A partner in the Boston law firm of Yurko, Salvesen & Remz, P.C., Doug Salvesen has served a s counsel to the association's practice of law by non-lawyers committee for more than 20 years and is a nationally acknowledged expert on the unauthorized practice of law. Doug can be contacted by email at dsalvesen@bizlit.com.

A STORM IS BREWING

Intent, effective dates and the impact of *FNMA v. Carr*

BY EDWARD A. RAINEN



ED RAINEN

In a recent decision in the matter of*Federal National Mortgage Association v. Thomas A. Carr*, No. 12-ADMS-10024, 2012 WL 6021306 (Mass. App.Div., Nov. 29, 2012), the Appellate Division of the District Court invalidated a foreclosure relying upon what is viewed by many as an erroneous interpretation of the requirements for a valid chain of assignments as expressed by the Supreme Judicial Court in *U.S. Bank National Association, v. Ibanez*, 458 Mass. 637 (2011).

Carr found that there was a defect in the chain of the assignments by reason of the date of the assignments without taking into account the principles of estoppel by deed that apply to mortgage assignments. In this case the original mortgagee, Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for 1-800-East-West Mortgage Co. Inc. assigned its mortgage to Regions Bank (Regions) by instrument dated and acknowledged April 29, 2008, recorded on May 5, 2008. Regions assigned the mortgage to Chase Home Finance, LLC (Chase) by instrument recorded immediately following the MERS assignment. However, the regions assignment was dated and acknowledged on April 17, 2008, 12 days prior to the MERS assignment. Both assignments purported to be effective as of an earlier date in time. On Feb. 12, 2010, nearly two years after execution and recording of both assignments, the first foreclosure publication occurred.

Ibanez does not operate to make the *Carr* foreclosure invalid. The out of order dates of the simultaneously-recorded assignments were not of the variety of mischief that the SJC sought to end in *Ibanez*. The *Carr* court found that the regions' assignment to Chase was not valid because it was executed 12 days prior to the execution of the MERS assignment, disregarding the actual recording order of the assignments, and thus Chase was not the holder of the mortgage, and not entitled to foreclose. In so ruling, the court failed take into consideration the doctrine of estoppel by deed and the application of its underlying equitable principles, which principles are applied to perfect title in a grantee when the grantor did not hold legal title at the time of the initial transfer, but acquires the title thereafter.

An assignment of mortgage is a short form conveyance pursuant to Section 9 of the Short Forms Act, Chapter 502 of the Acts of 1912, and as such, the cases that apply the theory of estoppel to a deed are applicable to an assignment. A leading case in this area is *Zayka v. Giambro*, 32 Mass. App. Ct. 748, 751 (1992) in which Judge Rudolph Kass, speaking for the court, reasoned: "It appeals to reason and a sense of what is equitable that, when a person manifests an intention to transfer title to property, an after-acquired ownership of that property will make good the imperfection of the original conveyance."

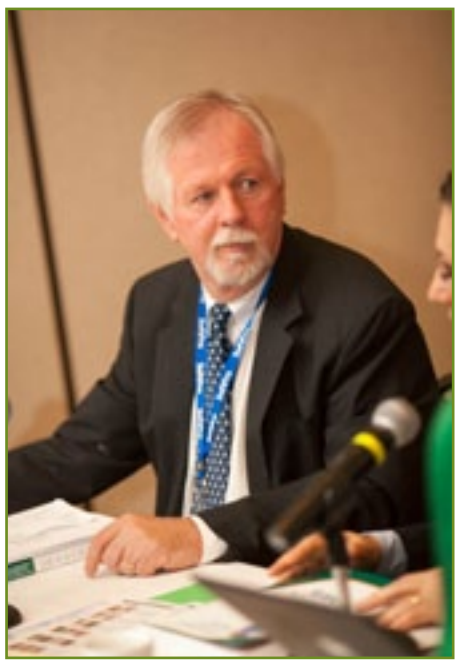
In discussing the equitable principles underlying the doctrine of estoppel by deed and expanding its application beyond warranty deeds, the court said: "If estoppel by deed is a sound principle, no compelling logic or binding precedent proscribes its application to a quitclaim deed … [and] invocation of the doctrine of estoppel by deed *turns not on the formal nature of the covenants but on what is the obvious intention of the parties*." *Zayka*, *supra* at 753. (Emphasis added.)

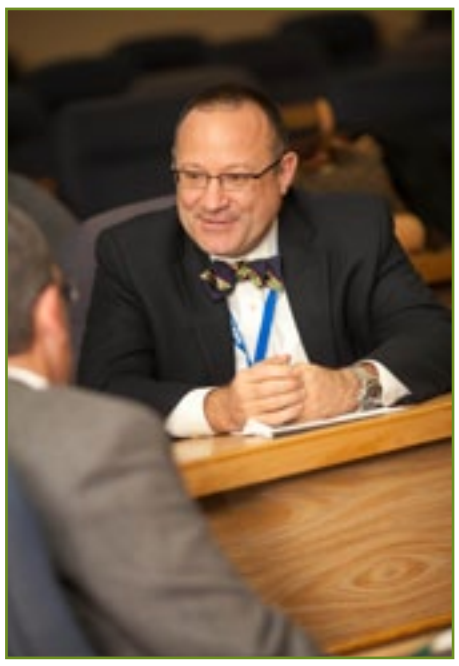
NO INNOCENT INTERVENING PARTIES

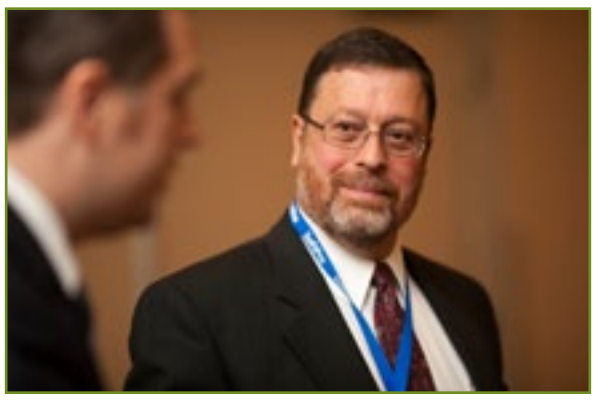
That ability to perfect title through principles of estoppel in appropriate circumstances is consistent with the judicial philosophy of ensuring that intent of the parties is satisfied when no intervening innocent parties are involved. "The theory is that 'where a deed of real estate shows by its language

See FNMA V. CARR, page 8

You oughta be in pictures: REBA's Annual Meeting & Conference 2012







My most important closing

CONTINUED FROM PAGE 3

where our kids stayed when it was time for their parents to have a short vacation. The house had been the center of our universe, but we naturally moved away to start our own lives and families, always returning for important events or for just dinner with Mom.

It was where we all gathered around the kitchen table last year to share the prognosis that the medical oncologist had explained to my mother and I earlier in the day. It was where I told my sisters than our mother would be gone in a few months. The house again became the center of our universe, as we maintained a constant vigil and sustained the spirits of Mom and one another.

A home is more than lumber and plumbing. It is more than the colloquial "American Dream." It is more than a mortgage application, an appraisal and a deed. A home is a gathering place. It is a safe place where you can laugh and you can cry. You can be alone or with a gang. You can fend off an illness, you can rejoice in accomplishments, you can teach your children everything you know. It is a playground. It is a school. It is a restaurant. It is an inn. It is a hospital.

From my key ring I removed the house key that I had carried since I was 11 years old, handed it to the young couple and I wished them well. I told them that their kids will love the playroom and the lake across the street. I went out to my car and had to sit and wait a few minutes for my eyes to clear.

Then I returned a call from my eldest son, who had left a message about an offer he had made to purchase his first home. It occurred to me that I had a front-row seat to witness the circle of life.

In the aftermath of the mortgage crisis and the ongoing foreclosure debacles, do not let the bad publicity associated with abuses in the mortgage market distract us from the true value of homeownership. Homeownership is priceless.

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.

Intent, effective dates and the impact of *FNMA v. Carr*

CONTINUED FROM PAGE 6

that it was intended to pass title by one form of conveyance, by which however title could not pass, courts have made the deed effective by construing it as a deed of some other form, notwithstanding the inappropriateness of the language.' *Kaufman v. Federal Nat'l Bank*, 287 Mass 97, 100-101, 191N.E. 422 (1934)." *Bevilacqua v. Rodriguez*, 460 Mass. 762, 773-774 (2011).

It is clear from *Ibanez* that claimed earlier effective dates are without force.

In *Carr*, there are no innocent intervening parties and no compelling reason not to apply the principles of estoppel by deed. While the assignment from MERS to Regions may have been executed 12 days *after* the assignment from Regions to Chase, there was a clear intent to transfer and assign the mortgage and Regions did acquire title contemporaneously with the assignment to Chase. The principles of estoppel by deed articulated by Kass in *Zayka v. Giambro*, and followed by Judge J. Cohen in *Dalessio v. Baggia*, 57 Mass. App.Ct. 468 (2003), perfected the earlier dated assignment of the mortgage, by operation of law, when Regions subsequently acquired title to the mortgage. There can be no doubt that this was the intent of the lenders.

In this case, the court focused on the issue of the purported earlier effective date of the assignments seemingly to the point of distraction as it focused on this issue and as one of the bases for its decision determining that the assignments did not vest title to the mortgage in Chase. It is clear from *Ibanez* that claimed earlier effective dates are without force. The court clearly rejected the use of effective dates for the purpose of establishing the transfer of ownership of a mortgage prior to the execution of the assignment. However, the recitation of an earlier effective date in an assignment does not, in and of itself, render the assignment invalid for any purpose so long as the assignment otherwise effectively transfers the mortgage to the assignee, and in the instance of a foreclosure, prior to the commencement of the foreclosure. The question is when title to the mortgage actually passed, and in the *Carr* facts, title passed at the time that Regions acquired title to the mortgage, and simultaneously assigned the mortgage to Chase.

It should be noted that FNMA, the plaintiff in *Carr*, did not submit a brief. There is concern in the conveyancing community that what is perceived to be an isolated misapplication of the holding in *Ibanez* may have ripple effects on the marketability of properties that were previously foreclosed that go beyond those caused by *Ibanez* itself. Titles that were deemed valid even after *Ibanez* could now be interpreted as void under *Carr*. We do not believe that this line of reasoning will be applied to discharges where there are out-of-order dates on assignments as principles of accord and satisfaction, in addition to estoppel by deed, should govern.

The author thanks Ward Graham, Bob Moriarty and Carrie Rainen for their contributions to this article.

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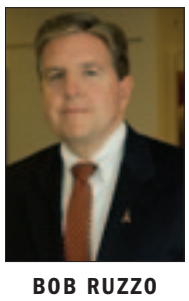
Regulatory changes offer new approach to Chapter 40b for municipalities

BY ROBERT M. RUZZO



BOB RUZZO

For too long, the legend surrounding Chapter 40B at the municipal level has been that a city or town has no choice when facing an undesirable Chapter 40B proposal but to adopt a reactive, litigation-based strategy.

The facts are somewhat different. Since 1982, the Housing Appeals Committee has supported the notion that careful well-established municipal planning efforts, provided they are being implemented, may form the basis for a supportable denial of a Chapter 40B development that is inconsistent with the municipality's plan. Moreover, for more than a decade, the regulations implementing Chapter 40B have embraced proactive municipal planning efforts by offering a respite from 40B proposals to cities and towns that have a housing plan that has been approved and certified by the Department of Housing and Community Development (DHCD), separate and apart from the respite from 40B proposals that is granted if truly significant affordable housing stock is added in any given year.

A more recent regulatory change, promulgated by DHCD in February 2008, goes even further, and affords un-

See REGULATORY CHANGES page 11

COMMENTARY

Challenges to real estate attorneys posed by storage of probate records in remote locations

ELIZABETH J. BARTON

BETH BARTON

Checking the records in Probate Court is an important part of every title examination. The probate check provides necessary title information about deaths, divorces, the appointment of guardians or conservators, heirs, devisees, powers of sale and licenses to sell, determinations of value, equity suits, name changes and petitions for partition. This information does not need to be recorded in the Registry of Deeds, but is critically important to any examination of title to real property and can significantly affect the title.

Having ready access to the information contained in older probate files is just as important for a proper and reasonably prompt examination of title as access to a recent probate file. The storage of probate records in locations remote from the Registry of Deeds is a significant obstacle to completing title examinations in a reasonably efficient and cost-effective manner. The additional time and cost to obtain and review probate documents from a distant probate court or records site is a real issue for the title examiner and the closing attorney as the difficulty of obtaining probate records increases.

Norfolk County's probate documents were moved from the Probate Court in the Norfolk District Registry of Deeds in Dedham to Canton several years ago; Worcester County's probate documents are "off site" and must be ordered 24 hours in advance before they can be examined; Middlesex North's probate documents are in the Probate Court with the Middlesex South Registry of Deeds in Cambridge; Essex North's probate records are in Salem, and the Probate Court in Salem is now in a building separate from the Essex South Registry of Deeds; Bristol County title examiners in the satellite offices in New Bedford and Fall River must travel to Bristol North in Taunton to examine probate documents; and in Berkshire County probate records are located in Pittsfield with the Berkshire Middle Registry of Deeds. Berkshire South and North title examiners must go to Pittsfield to retrieve probate documents.

The current owner in the chain of title for a parcel of property must be checked in the Probate, Divorce and Equity indices in the Probate Court for the county where the property is located. Some title examiners do a probate, divorce and equity check on each owner in the chain of title. There are computer indices in every registry, so the existence of the probate may be determined, but the documents are not available at the registries as described above. The title examiner's job is to provide the closing attorney with the information that is filed in the Probate Court, and the closing attorney must interpret the information in the documents and make sure that any conveyance includes any necessary Probate Court or fiduciary action. The easy availability of the probate documents is vital to this evaluation process.

Beth Barton is title counsel at CATIC. She may be reached at BBarton@CATICACCESS.com.

Helen and Rudy Kass share a lighter moment at REBA's annual meeting and conference. Judge Kass, a mediator with REBA Dispute Resolution, presented REBA's highest honor, the Richard B. Johnson Award, to Joel M. Reck. A former partner in the Boston-based international law firm of Brown Rudnick LLP, Reck is also a mediator for REBA Dispute Resolution.

CHANGING LANDSCAPE

Lawyers Professional Liability Insurance

What are the reasons why a law practice might chose to obtain their lawyers' professional liability insurance from a particular source? Is it price? Service? Quality of the coverage? What about the knowledge and experience of the agent and underwriters? And let's not forget additional services like risk management assistance.

Landy Insurance Agency, REBA's proud affinity partner for lawyers' professional liability insurance, can help assure that you choose your coverage for all of the right reasons. With over 63 years of experience and access to many of the finest insurance companies in the industry, our goal is to find coverage that best fits the needs of your practice.

After several years of relative stability in the insurance market for law firms, the landscape is changing. The real estate and financial crisis has produced a significant increase in malpractice claims. Policy holders can expect stricter underwriting guidelines, changes in carrier appetites and higher premiums. The Landy Agency staff can help you negotiate these changes. Their relationships with underwriters allows them to work on your behalf, whether your practice is large or small, newly established or in business for years.

Many of Landy's insurers also provide risk management services, such as newsletters, hot lines and even CLE credits, as part of the coverage. One of the most significant things any law practice can do to keep the cost of their malpractice insurance as low as possible is to utilize good risk management techniques in all aspects of practice, including record keeping, client selection, engagement and disengagement letters and so on. Services available from the Landy Agency can help with this.

Podcasts discussing risk management issues and other topics are available on iTunes by searching for the "Landy Law Letter."

For more information or to obtain a quote, please contact John Torvi at 781-292-5417 or at johnt@landy.com, or visit www.landy.com.

Jon Davis accepts warm applause from members and guests at REBA's annual meeting and conference. Davis, who first joined the REBA board in 1986, stepped down at the end of December. Davis, who has led REBA's efforts to combat the practice of law by non-lawyers since the early 1990s, served as the association's president in 1995. In 2002 he received the Richard B. Johnson Award, a lifetime achievement award and REBA's highest honor.

Land Court Associate Justice Gordon H. Piper and REBA President Chris Pitt discuss the court's limited assistance representation (LAR) program which was launched at the beginning of this year. Piper, who joined the court in 2002, served as the association's president in 1998.

REBA sues to stop online sale of deeds

REBA has filed an action in Suffolk Superior Court to stop a New York corporation from selling deeds for Massachusetts properties. Also named in the complaint is the Massachusetts attorney, Nabeel Alexander, Esq., who purportedly reviews the deeds, knowing that they will be sold by a non-lawyer to Massachusetts consumers.

ANA Deeds, Inc., which describes itself as a "legal document service," advertises and sells deeds, affidavits, releases, subordinations, driveway easements and other legal instruments for Massachusetts real estate. Customers provide certain factual information, including the legal description of the property being transferred, to ANA Deeds through its website. That information is entered by ANA Deeds into one of its document templates. A completed deed or other legal instrument is then sent back electronically to the customer. Most of ANA Deeds' customers are mortgage lenders or settlement service providers who themselves re-sell the legal instruments to a party to a real estate transaction.

Shortly after filing the complaint, REBA sought a preliminarily injunction to enjoin the defendants from providing deeds to customers in Massachusetts. The motion for preliminary injunction was based on the Supreme Judicial Court's recent decision which affirmed that drafting deeds for others is the practice of law. *The Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs*, 459 Mass. 512, 524 (2011). Consequently, only attorneys licensed to practice law can provide deeds for Massachusetts properties.

At the hearing on the motion before Superior Court Judge Peter Lauriat, ANA Deeds conceded that it provided deeds for Massachusetts properties. However, ANA Deeds argued that it was not subject to the *REBA v. NREIS* decision for two reasons. First, ANA Deeds argued that, even though it is a non-lawyer, it should be allowed to sell deeds because they are reviewed and approved by a Massachusetts attorney. ANA Deeds also asserted that the automated manner in which it provides deeds is little more than a "clerical task" and, therefore, should be permitted under the *REBA v. NREIS* decision.

The Superior Court rejected each of the arguments raised by the defendants. In its Dec. 18, 2012, order, the court found that ANA Deeds was engaged in the unauthorized practice of law. The court noted that having a Massachusetts attorney review and approve the deeds before they are sent to ANA Deeds' customers does not render its activity lawful. Moreover, the court indicated in its order that the Massachusetts attorney has "likely violated various ethical rules by providing legal services to the non-lawyer co-defendants for resale." Noting that the defendants' activities may harm Massachusetts consumers, the court has preliminarily enjoined them from selling deeds or other legal instruments for property located in Massachusetts.

A preview of MassDEP's proposed regulatory reform measures

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Also in the Wetlands Program, a general permit will be established for ecological restoration projects, like dam removal, stream daylighting, shellfish habitat restoration, and building fish passages. The revised regulations will provide the criteria for such a permit-by-rule as well as standard permit conditions.

STORMWATER MANAGEMENT

Expanding on regulatory revisions made in 2008, the upcoming changes will provide additional exemptions for resource areas constructed to comply with MassDEP's 1996 stormwater management policy (which were promulgated as regulation in 2008). This exemption will remove any disincentive to better manage stormwater caused by creating additional areas of Wetlands Protection Act jurisdiction.

MassDEP wanted to craft incentives to better protect the 100-foot buffer zone. The agency had proposed a general permit for work in the outer 50 feet, obviating any application to the local conservation commission. However, the stakeholder group could not come to consensus on a way to implement this idea, so MassDEP instead will expand its existing list of "minor" activities in the buffer zone that are not subject to regulation. This list is expected to include the installation of certain public utilities (maintenance of these utilities already is exempt, by statute).

As part of the Regulatory Reform Initiative, MassDEP already has implemented a new standard operating procedure in its Wetlands Program to better utilize staff time. File numbers are assigned immediately upon receipt of notices of intent, instead of waiting until the staff reviews and issues comments. This eliminates the delay in Conservation Commission public hearings waiting for MassDEP issuance of file numbers. MassDEP Wetlands staff also now limits their comments and oversight to those notices of intent for projects with potential to significantly impact resource areas. MassDEP similarly strategically allocates Wetlands staff to review such projects when a superseding order of conditions is requested.

MassDEP's Waterways/Chapter 91 Program likewise will have some policy and regulatory changes. Regulations will be proposed to implement 2011 statutory amendments (G.L. c. 91, § 18C) establishing a general permit for small non-commercial docks and piers. Eligibility criteria, conditions, and a self-certification process are expected to be included. For larger projects subject to review under both the Massachusetts Environmental Policy Act (MEPA) and Chapter 91, regulatory changes are designed to streamline the process by allowing MassDEP to begin project review before the MEPA process is complete (with the issuance of the secretary's final certificate). This could shorten regulatory review by a month or so.

MassDEP is considering establishing a license term policy for Chapter 91 approvals of non-water-dependent projects. Terms presently are negotiated for each project, typically for between 30 and 65 years. The new policy would reduce staff time, increase certainty and transparency, and potentially allow for terms of up to 99 years.

Langley did not cover the proposed regulatory and policy reforms for the waste site cleanup, solid waste, wastewater or asbestos abatement programs, which also are part of the Regulatory Reform Initiative. Information about those programs may be found in MassDEP's Oct. 10, 2012 "Progress Update and Plans for Additional Reforms (www.mass.gov/dep/about/priorities/regreform/1012update.htm).

At press time, Langley estimated all the draft regulations will be released for public comment the week of Feb. 11, 2013, with final regulations promulgated by the end of 2013.

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Regulatory changes offer new approach to Chapter 40b for municipalities

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precedented flexibility to municipalities that have been proactive in addressing their affordable housing needs via vehicles other than Chapter 40B. The 2008 regulations require all subsidizing agencies to consider recent municipal actions before issuing any site approval letter. In two notable instances, MassHousing has declined to issue a site approval letter due to a combination of recent municipal actions to foster housing and issues surrounding the proposals being proposed under Chapter 40B.

40R TRUMPS 40B

The first case in point involved a proposal in the town of Reading to build 20 new affordable home ownership units on 2.16 acres. While new housing stock is generally needed, there were two primary reasons MassHousing rejected this proposal.

First, Reading had made a good-faith effort to increase its affordable housing stock, most notably by approving two smart-growth overlay zoning districts under Chapter 40R. These districts – one of which is located in close proximity to where the 20 new units would have been built – permit 458 new units by right. As noted, the Comprehensive Permit Guidelines and Regulations issued in 2008 provide that subsidizing agencies like MassHousing should, when they are considering applications for site approval, take into account "municipal actions previously taken to meet affordable housing needs." Reading's actions in this instance were substantial.

In addition, the proposed Chapter 40B development site included two existing homes that fit in well with the pattern of development in the surrounding neighborhood. To "de-construct" this well-established neighborhood and demolish the existing homes in favor of 20 new units of housing, especially in the context of a constrained site plan, was, in the agency's opinion, ill-advised. MassHousing also viewed the proposed site plan as inconsistent with the 2008 guidelines and regulations.

A combination of these factors led the agency to conclude that a site approval letter should not be issued in this instance. Today, that well-established neighborhood remains intact, and some 53 new units of housing (11 affordable) have already been completed in one of Reading's two Chapter 40R districts.

Similarly, Easton, which made a strong financial commitment to the redevelopment of the historic Ames Shovel facility to allow it to be converted to housing, was confronted with a Chapter 40B proposal that raised some substantial questions about access to the site and potential impacts upon an area of critical environmental concern. Again, MassHousing declined to issue a site approval letter.

AFFORDABLE HOUSING TO REBOUND FROM RECESSION

To be sure, there is still a great need for new, affordable housing. But the Reading case illustrates that there are situations where a new Chapter 40B development is not the best choice, especially where local officials have already shown a strong commitment to affordable housing through channels other than 40B. Easton echoes this type of proactive approach, as that municipality not only adopted a Chapter 40R district, it also made a significant commitment of Community Preservation Act funds to assist the redevelopment of the Ames Shovel Works.

The regulatory changes encouraging this sort of proactive municipal approach are still relatively new, and many 40B proposals have lain fallow during the Great Recession. As the housing sector emerges from its trough, Chapter 40B activity will undoubtedly increase, and the answer to the fundamental question of how much "recent municipal action" is enough will take more definitive shape. So, while it is still too early to tell whether such a proactive, planning-based strategy will supplant the more traditional reactive, litigation-based approach that has been the hallmark of 40B controversies through the years, a new conversation about proactive municipal housing approaches is taking shape.

Perhaps a new legend is being born. One reason for optimism? Planners are less expensive than lawyers.

Bob Ruzzo was the deputy director of MassHousing, the state's affordable housing bank, from 2001 to 2012. He is also a past co-chair of the REBA Affordable Housing Committee. The opinions set forth herein are his own.