REBA slays the UPL dragon.
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Walk to the Hill
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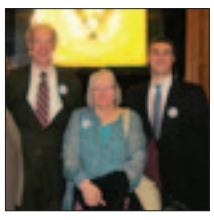

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REBA news
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House Speaker DeLeo to address REBA's Spring Conference

Long-time REBA member Robert A. DeLeo, speaker of the Massachusetts House of Representatives, will deliver the luncheon keynote address at the Association's Spring Conference on Monday, May 6, at the Four Points by Sheraton Hotel and Conference Center in Norwood.

ROBERT A. DELEO

REBA's Spring Conference comes in the first few months of the 2013-2014 legislative session. DeLeo will offer some insights on the legislative process and some of his expectations for the two-year session. His 20-plus years of service in the Massachusetts General Court during challenging times for the commonwealth will provide an important and unique perspective for the REBA audience.

A practicing attorney and long-time REBA member, DeLeo (D-Winthrop) has represented the 19th Suffolk District, which includes the town of Winthrop and a portion of the city of Revere, since 1991.

DeLeo became speaker of the Massachusetts House of Representatives in 2009. Starting from his acceptance speech, when he vowed to target House rules, ethics, transportation and pension reform, he has set the House on a path to reform. Within 100 days, the House passed sweeping reforms in each of those areas. In one of his first acts as speaker, he instituted a maximum limit on the speaker's term, capping it at eight years.

DeLeo also served as chairman of the House Committee on Ways and Means, the House Committee on Bills in Third Reading, the House Committee on Ethics, and as chair of the Joint Committee on Local Affairs. Prior to his time on Beacon Hill, DeLeo chaired the Winthrop board of selectmen for nine years.

A graduate of the Boston Latin School, DeLeo holds a bachelor's degree from Northeastern University and a juris doctor from Suffolk University Law School.

To register for the REBA Spring Conference go to www.reba.net.

UNAUTHORIZED PRACTICE OF LAW

Equifax Settlement Services

In April 2011, in REBA's landmark case, *REBA vs. NREIS*, the Supreme Judicial Court said that witness or notary closings are the unauthorized practice of law. Despite this ruling, the scourge of witness closings continues, almost unabated, in Massachusetts. The Unauthorised Practice of Law Committee knows that national and regional lenders are performing witness closings here every day.

Recently, a number of our members have received unwelcome solicitations to perform witness closings from Equifax Settlement Services, a Pennsylvania-based vendor-management company believed to have a similar business model as NREIS.

REBA's Practice of Law by Non-Lawyers Committee is working with our counsel and certain national title insurance underwriters to make certain that all out-of-state players understand that witness closings are barred in Massachusetts.

In the meantime, the committee urges REBA members to familiarize themselves with the findings in the *NREIS* case and to act with caution before accepting an engagement from Equifax or any other witness closing company.

If any REBA members has received a solicitation to perform witness closings for any out-of-state non-lawyer settlement service provider, please contact the UPL Committee at upl@reba.net.

REBA holds Residential Conveyancing Committee meetings

The Real Estate Bar Association's residential conveyancing committee hosted its winter round of regional meetings in collaboration with county or local bar associations, bringing a strong grassroots turnout of members and guests. These meetings were held in Pittsfield, Middleton, Worcester, Plymouth, Hyannis, Newton, Springfield and Fall River.

Doug Salvesen, counsel to the association's unauthorized practice of law committee, and Tom Moriarty, co-chair of the residential conveyancing

See MEETINGS, page 5

Revitalized committee launched to support paralegal members

BY JACQUELINE WATERS ADAMS

JACKIE WATERS ADAMS

REBA's Paralegal/Title Examiner Committee (PTEC) was originally launched in 2006 in an effort to afford the association's non-lawyer professionals a resource for informational bulletins, educational programs, networking and career advancement. The newly revitalized Paralegal Committee will focus primarily on the needs of our paralegal members.

The group will work directly with REBA's Continuing Education Committee, assisting with the formation of breakout sessions at the association's semi-annual conferences that focus on topics specifically geared to paraprofessionals and newly-admitted attorneys.

The possibilities for this new committee reach beyond the work that its members will do with the Continuing Education Committee. The direction this new group takes will be structured by its members. Possibilities include the expansion and updating of REBA's paralegal website; the structuring of educational sessions at open meetings of the committee, as well as the association's semi-annual conferences, where issues of the paralegal profession will be discussed; professional and social networking opportunities; and an email chain where members of the committee can reach out to one another to discuss issues within the profession and seek guidance and support from peers.

The resurgence of this committee comes at a critical time. My fellow task force members – Bebe Casey, of WFG National Title Insurance Company; Mary-Margaret Moniz, of Burns & Levinson, LLP; Don Brown, of First American Title Insurance Company; and Kevin Atwood, of Massachusetts Attorneys Group Title Insurance – and I believe that one's membership in REBA speaks

See PARALEGAL, page 2

PRESIDENT'S MESSAGE

Regional meetings bring a wealth of material to members

BY MICHAEL D. MACCLARY

MIKE MACCLARY

One task that I enjoy as president of REBA is to (try to!) attend the various meetings of the regional affiliates of REBA's Residential Conveyancing Committee. I participate in these meetings throughout the commonwealth during the months of January and February to help educate our members on current happenings of REBA and the state of conveyancing in general. My role is extremely limited in these meetings. I am introduced to the crowd (and I mean crowd as we have anywhere from 20 to 100 attendees!) and I pitch the benefits of REBA membership to those are not yet members and the benefits of committee membership to those who are already REBA members.

After my five-minute spiel, I pass the mic to those much more educated on the subject. Our president-elect, Michelle Simons, dissects the changes to SJC Rule 1.5 regarding engagement letters, former President Tom Moriarty discusses our ongoing battle against the unauthorized practice of law, REBA's Clerk Susan LaRose attempts to translate 1,500 pages of the Consumer Financial Protection Bureau's (CFPB) changes to RESPA, and even our Executive Director Peter Wittenborg, gets in on the fun with an update of pending Massachusetts legislation which could affect our members.

We also get to eat for free at these events thanks to the generous support of Landy Insurance and Massachusetts Attorneys Title Group.

These meetings give me a very strong sense of who the members of REBA are. They are the lawyer from Pittsfield who is struggling with the need to have engagement letters for each of her clients, and the second-year student from Suffolk Law trying to make a few connections in the real estate field; REBA's former clerk, Chris Plunkett, who graciously hosted us as a part of the Essex County Bar Association event, and the Norfolk County Register of Deeds Bill O'Donnell, who attended our Newton meeting; the newly-minted lawyer in Springfield who receives weekly solicitations from out-of-state settlement agencies looking for "puppet closers," and the seasoned veteran in Newton who wants to see if someone has a form fee agreement that she can borrow.

We get questions from the attendees, mostly astute follow-ups on our topics of the day, while others are from left field, such as "So, ah, what if I don't do engagement letters, who's gonna catch me?" These meetings have really given me the opportunity to see what REBA means to its members.

Most importantly, the members who attend these meetings really appreciate what we offer them. It is one thing to read article or an email blast about the CFPB's changes and how they may potentially alter the way a residential closing is done in a way that is further-reaching than anything else in the last 25 years, but to hear Susan describe the provisions that will result in dramatic changes to one's practice is clearly another.

The numbers show that about one in five REBA members has been to one of these events in 2013. If you have attended, I hope you have gleaned at least one nugget of information that will help your practice. If you have not and find that these things may affect you, please reach out to any of us or the REBA office and we will be more than happy to bring you up to speed on these issues.

The "road shows" are over for this year, but I'll fondly remember the idyllic drive to Pittsfield, the pizza at the Red Rose in Springfield and being hosted in the beautiful new Worcester Registry of Deeds. If you can make one in 2014, I suggest that you do, as I'm sure you will come away a bit more educated on issues that affect us all.

Mike MacClary is 2013 president of REBA and a partner at Burns & Levinson, LLP. He can be reached at mmclary@burnslev.com.

Revitalized committee launched to support paralegal members

CONTINUED FROM PAGE 1

volumes about a paralegal's dedication, interests and concerns for the legal profession.

REBA is the architect of the real estate law profession as we know it today, as well as the author of many related statutes, standards and customs. REBA serves as the core for problem-solving in the industry. If not for the numerous times that REBA has fought, and continues to fight, on our behalf against witness closings and non-attorney closings, consumers would continue to be compromised and many of our jobs would not exist. Without the leadership of this association, the real estate law profession, including both attorneys and paraprofessionals alike, threatens to take on a very different and less favorable landscape.

Jackie Waters Adams is a paralegal at Zaltas, Medoff, Raider & Levoy, LLC in Natick. She is the Chair of REBA's Paralegal Committee. Jackie can be reached at zmrllaw.jwa@conversent.net.

Fitting the Good Funds Statute with teeth

BY JAYNE TYRRELL AND DOUGLAS W. SALVESEN

In 1994, the collapse of Cambridge-based Abbey Financial sent shockwaves through the mortgage industry. Abbey Financial, which at one point was the commonwealth's sixth largest mortgage lender, was caught in a tide of rising mortgage loan rates. After aggressively selling low-rate mortgages to consumers, and unable to find the financing to fund those mortgages, Abbey Financial was caught in a cash crunch and succumbed.

As a result of Abbey Financial's demise, more than 350 Massachusetts homeowners each lost an average $1,200 in fees. An equal number of homeowners were left with unfunded mortgages when Abbey Financial filed for Chapter 11 bankruptcy court protection.

The Legislature reacted by enacting the Good Funds Statute, G.L.c. 183, §63B. The Good Funds Statute, which applies to both residential and commercial loans secured by a mortgage, requires that the loan proceeds be transferred to the mortgagor, the mortgagor's attorney or the mortgagee's attorney in the form of good funds, i.e., a certified check, bank treasurer's check or cashier's check, prior to the recording of the mortgage.

The "show me the money" approach required by the Good Funds Statute ensures that Massachusetts borrowers are protected from the harms associated with unfunded mortgages. However, too often, mortgage lenders ignore the law and refuse to transfer the mortgage proceeds as required before recording the mortgage. As a result, Massachusetts borrowers are at risk of another Abbey Financial-like debacle.

Disregard of the Good Funds Statute reduces the dollars that flow into the commonwealth's Interest on Lawyers' Trust Accounts (IOLTA) program. Under Rule 1.15 of the Professional Rules of Conduct, client funds, including mortgage proceeds held by attorneys pursuant to the Good Funds Statute, must be deposited into the attorneys' IOLTA accounts. The interest generated in those accounts is distributed by the IOLTA Committee to the Massachusetts Legal Assistance Corporation, the Boston Bar Foundation and the Massachusetts Bar Foundation to fund legal aid providers and to improve the administration of justice. In the last five years, IOLTA receipts have fallen precipitously, in part because of the disregard of the Good Funds Statute.

One reason that the Good Funds Statute is disregarded is that there is no mechanism for its enforcement. State Sen. William N. Brownsberger has sponsored legislation to correct this oversight.

Senate Bill 417 proposes amendments to the Good Funds Statute to create a private right of action for any mortgagor aggrieved by a violation of the statute, and provides for actual damages or, absent actual damages, statutory damages of $1,000 for each violation, plus costs and reasonable attorneys' fees. The proposed amendments also empower the Undersecretary of the Massachusetts Office of Consumer Affairs & Business Regulation to enforce the statute and to promulgate reasonable rules and regulations relating thereto. Under the proposed law, a violation of the statute would constitute a violation of Chapter 93A, and could be considered grounds for suspension of a lender's license to make mortgage loans in Massachusetts.

The proposed amendments, if enacted, would better protect borrowers, generate additional funds for legal services, and deter the unauthorized practice of law that accompanies violations of the Good Funds Statute. Copies of Senate Bill 417 are available online at www.malegislature.gov/Bills/188/Senate/S417.

Jayne Tyrrell is the executive director of the Massachusetts Interest on Lawyers Trust Account Program (IOLTA). The program provides funds for legal services to the poor and for improving the administration of justice. Jayne can be contacted by email at jtyrrell@maiolta.org. A partner in the Boston law firm of Yurko, Salvesen & Remz, P.C., Doug Salvesen has served as 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.

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

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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 recession and my cousin Vinnie's law practice

BY PAUL F. ALPHEN

PAUL ALPHEN

My cousin Vinnie called me after the BC v. Clemson basketball game. He said: "You almost witnessed BC snatch defeat out of jaws of victory again! Maybe BC should shorten their game times by four minutes." I ignored him and told him about the extensive outreach that the BC Athletic Department had undertaken to connect with alumni and fans to improve the fan experience at games. He told me that it was a pipe dream and I should sell all my maroon and gold shirts and fleeces, and find another college team to follow. I didn't tell him that I envied my youngest son, who bleeds blue and white, and his fellow alumni who have stuck with their team through thick and thin. Sports fans are a strange breed. Vinnie changed the subject and started to pontificate on the trials and tribulations of his suburban real estate practice.

"Paulie," he said, "how's business?" I told Vinnie that I am fortunate that most of my clients are hard-working, self-made, successful business people who survived the Great Recession by being careful and by working day and night. "How is your practice, Vin?" I asked. Perhaps I shouldn't have asked.

"P," he said, "This economy is killin' me! I got clients that figure they have to cut legal costs so they ignore issues until the last minute. They call me one hour before the world comes to the end and tell me I've got one hour to tell them how to get out of a jam. They email me 50-page documents and expect me to review them and give them advice within 60 minutes. In the old days, my former partner would have told them to 'pound sand,' but these days I can't say no to anyone. So, I Evelyn Wood though the 50 pages and send an email to the clients with a list of David Letterman's top 10 things that are rotten with the document. They sign the things anyway. I'm waiting for one of them to get their shirt caught in the ringer and blame me for their misfortune."

"Ok, Vin, we all see some of those things; what else is happening?"

"P," Vinnie responded, "I've got other clients that think they can cut legal costs if they tell me only 1 percent of the facts in their case. They somehow think that I will assume there are no more facts and magically solve their problems using a thimbleful of information. Better yet are the clients that try to do things themselves and they think that their failed efforts attempting to solve the problem will be valuable to me. It's like cousin Dr. Sal tells us; his patients don't want to bother him, so they end up in the emergency room vomiting blood rather than calling Sal a week earlier when they first felt like crap."

Vinnie continued. "For example, today my high school buddy Charlie called me and told me that he wants to sue everybody because he bought a piece of property six years ago and the deed and the mortgage description are wrong. He bought a little lot in a subdivision in East Underwear and he went to the closing without counsel. Perhaps Chuck was afraid I would charge him more than six beers if I went to the closing with him. Turns out that the deed and the mortgage refer to Lot 4, but two months earlier the developer had recorded a new plan creating Lots 3A, 4A and 5A, but nobody noticed until it was too late. Turns out his neighbors own some of his lot. Chuck went back and complained to the closing attorney, who tried to solve the problem, but Chuck's mortgage was now held by The Wizard of Oz, and nobody could get behind the curtain. Chucky expected me to sue everybody on a contingency fee."

Vinnie wasn't finished. "Three weeks ago my old college roommate Chip, the real estate developer, called. Chip is developing a commercial project in the town of West Raspberry, and as part of the 'mitigation package,' they asked him to grant an easement over his land so the town could get access to some recreation land in the rear. Chip drafted his own deed and the town recorded it. Turns out the town never performed a title exam before recording the deed and the easement land is subject to three mortgages and a patchwork quilt of prior conveyances. West Raspberry is now holding Chip's commercial project hostage until Chip clears the title. Chip was in tears telling me that unless I solve the problem Chip was going to lose millions of dollars. I like Chip, he's a good guy; back in college when he set the dorm room on fire, he took complete blame. But, I felt like asking him what he was thinking when he prepared a deed himself and when he delivered it to the town without first calling me … but I didn't. I told him that I would see what I could do. Chip said, 'Thanks, Vin. I knew I could count on you, but see if you can keep the bill under five hundred.'"

I asked Vinnie if he was able to solve the problem. Vinnie said: "Paulie, the great thing about being old guys is that there is no problem that we can't solve. The problem isn't solved yet, but I'm making progress. But I know full well that if I spend 20 hours working out a solution, and saving Chip's millions, he will be insulted if the bill exceeds $500. In our small practice we have been doing whatever it takes to help our clients weather the economy, but the experts said that the recession would be over by 2012. I need it to end soon."

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.

I never 'met a data' I didn't like

BY JAMES S. BOLAN

JIM BOLAN

"Metadata" is the electronic subtext contained in computer generated documents. It can contain the properties of a document, including authors' names (past and present), prior versions with revisions, the tracked changes, hidden text and comments. If you send a purchase and sale agreement electronically, a recipient can "reverse engineer" the document and find all of the above, if it has not been removed from the document. The client of the sending lawyer would not benefit if the other party were to see that the sale price or a pertinent condition of sale had been revised in a prior draft. So, what are the risks related to metadata, how are the risks addressed, and how should we plan and respond?

THERE IS A DUTY NOT TO DISSEMINATE METADATA

Many states generally agree that, outside of a discovery/subpoena context, attorneys sending electronic documents have an ethical duty to take reasonable care not to disclose their clients' secrets and confidences. Various ethics opinions state that lawyers must take "practical measures" to purge and/or remove metadata to prevent the disclosure of confidential information. In some jurisdictions, lawyers who lack knowledge of metadata technology are required to obtain competent computer support to comply with their ethical obligations.

RISKS AND CONSEQUENCES OF DISCLOSURE

The risk at issue is inadvertent disclosure of confidential or privileged information, the disclosure of which would be detrimental or embarrassing to the client, such as editorial comments, strategy considerations, legal issues raised by the client or the lawyer and legal advice provided by the lawyer.

The consequences of the risk include a fight over the use of the metadata and whether attorney client privilege or confidentiality has been waived; the risk of a malpractice suit being filed for negligence, breach of confidentiality and fiduciary duty, among other claims, and the risk of a Board of Bar Overseers complaint for violation of Rule 1.6 (confidentiality) among other claims.

See META DATA, page 11

Prophylactic planning and remedial steps

Given the duty to take care before sending:

1. Scrub or protect documents first.
2. Inform clients not to disseminate electronic versions of documents in Word format to anyone other than counsel.
3. Save and send a document in PDF format after having scrubbed the Word version.
4. Consider confidentiality agreements and protective orders that include specific language that the recipient will not search for metadata and will return to the sender any document or any document with metadata, in advertently sent.
5. Consider doing a search for key terms to make sure that names or information that you would not want the "other side" to see are removed. For example, if you are reusing a form (and this happens a lot), make sure that the Jones P&S is not copied verbatim for the Smith P&S without removing all of the references to Jones and the metadata as to that document.
6. Many lawyers send along emails chains without first checking to remove your own client's email address and other protected information, such as prior content.
7. Place a disclaimer on all material communications that the documents are privileged, that no consent is being given to search for metadata or other inadvertently delivered infor mation.
8. If the "horse has left the barn" when you learn of the inadvertent delivery, send an immediate request/demand to preserve confidentiality, a statement that privilege is not being waived and a request/demand to return the document immediately without sav ing a copy.
9. For litigation purposes, produce a privilege log immediately of the in advertently delivered documents.
10. Propose other reasonable ways to rectify the inadvertent disclosure and, if need be, seek recourse from the court on an emergency basis.

MassDEP penalty illustrates tensions in hazardous waste cleanup

BY SAMUEL BUTCHER

SAM BUTCHER

In one respect, a January press release from the Massachusetts Department of Environmental Protection (MassDEP) appears to highlight diligent efforts by the MassDEP to assure that hazardous waste cleanup in Massachusetts is done right. But the press release also illustrates a delicate balance that must be struck between assuring that enough assessment and remediation is completed on one hand, and minimizing the costs associated with these activities on the other. It also provided another example of the challenges faced by the state agency tasked with assuring the proper cleanup of oil and hazardous waste spills and those who complete these cleanups.

The press release was headlined, "Minnesota Company Assessed $6,000 Penalty for Failing to Meet Oil Spill Cleanup Requirements at Millis Residence." It went on to report that after an audit of a cleanup company's closure report, "MassDEP found that the cleanup requirements had not been followed, and potential exposure to contamination had not been evaluated."

In Massachusetts, the cleanup of releases (e.g., spills, leakage, dumping) of oil or hazardous materials is completed in accordance with a regulation called the Massachusetts Contingency Plan – 310 CMR 40 (MCP). Although MassDEP is ultimately in charge of assuring that the cleanups are complete, the majority of these cleanups are conducted by persons licensed by the state to conduct the work. These licensed site professionals (LSPs) determine how big the problem is, the risk associated with the contamination, how best to clean it up and ultimately, how much cleanup is necessary – "how clean is clean enough." LSPs – and MassDEP, which oversees them – answer questions like: how many truckloads of contaminated soil have to be removed; how many soil samples have to be collected; and what level of assessment is necessary to assure that the job is done right. Removing more contaminated soil and collecting more samples might give LSPs/regulators more comfort that their decisions are valid, but that comfort costs money, and particularly in situations involving homeowners, the cost can be a significant factor in the decision-making process.

The press release highlighted a situation in which MassDEP concluded that more samples should have been collected to support the LSP's conclusions that fuel oil, which leaked from a tank within a residence, had been adequately investigated and cleaned up. The LSP collected soil, groundwater and indoor air samples, but MassDEP concluded that additional samples should have been collected to support the conclusion. In striking a balance between the comfort associated with more information and the cost associated with getting that information, the LSP was comfortable with one balance point (less samples and less cost) and the MassDEP another (more samples and more cost).

Ultimately more samples were collected, but the acquisition of more information did not change the conclusions about whether the site was adequately cleaned. But it did provide more information and more comfort that the release was properly investigated – and it cost more.

The point is not that the LSP was right because the additional information did not change the conclusions. Nor is it that MassDEP always wants more data at more cost. After all, more information and more cleanup means more certainty as to whether hazardous materials remain, and the health risks associated with that material – there have also been instances when additional sampling has disproven what was originally presumed.

The point is that when evaluating properties where a release of oil or hazardous materials has occurred, there are different ways of evaluating and cleaning up the property, and that one should be aware of competing factors associated with these cleanups.

Samuel Butcher is a licensed site professional and vice president at Loureiro Engineering Associates, based in Rockland. Sam can be reached at swbutcher@loureiro.com.

REBA slays the UPL dragon

REBA holds Residential Conveyancing Committee meetings

CONTINUED FROM PAGE 1

committee, briefed the regional groups on REBA's intensified and expanded efforts to eliminate witness-only closings, forbidden by the SJC in its 2011 decision in *REBA vs. NREIS*. These efforts will include class actions and M.G.L. c.93A claims.

President-elect Michelle Simons discussed the BBO's revised rule relating to engagement agreements and its application to the world of residential conveyancing. Executive director Peter Wittenborg and legislative counsel Ed Smith reported on the association's key Beacon Hill initiatives for the legislature's 2013-2014 session.

RCC co-chair Susan LaRose led the groups through the complexities and formidable challenges of the federal CFPB's proposed integrated disclosure rule for RESPA and truth-in-lending in residential lending. LaRose also discussed the daunting challenges faced by all residential lenders to comply with the CFPB's proposed "ability to repay" rule.

Finally, RCC co-chair Tom Bussone discussed how residential real estate lawyers can support the association's unauthorized practice of law initiatives by joining the Massachusetts Attorneys Title Group.

Extending the three-year statute of limitations for legal malpractice claims

BY JENNIFER L. MARKOWSKI

Although legal malpractice claims are governed by a three-year statute of limitations, in recent years title insurers have argued with some success that the indemnification language contained within their agency agreement permits them to pursue a breach of contract claim under the longer six-year statute of limitations applicable to contracts.

There is no Massachusetts appellate court decision directly on point, but two Superior Court justices have denied motions to dismiss holding that the statute of limitations for legal malpractice claims does not apply, because the written indemnification provision gives rise to a separate breach of contract claim that is governed by a six-year statute of limitations.

The merits of the holdings in the two cases will be a source of ongoing debate, since the statute of limitations which governs legal malpractice claims explicitly states – without exception – that it applies to actions in tort and contract. In any event, title agents should be aware that even if more than three years has passed since a title error was discovered, a title insurer may still decide to assert a claim against the agent for its losses. In fact, according to the recent decisions, the insurers have at least six years to assert the claim, and the insurers have contended they have as much as six years from the date of settlement, judgment or resolution of the title claim.

Integral to both Superior Court decisions was the indemnification clause that is common to agency agreements between title insurers and their agents. In general terms, such indemnification clauses require agents to indemnify the insurer for losses caused by the agents' ordinary or gross negligence in performing their services.

In order to enforce the indemnification provision, the insurer must first prove that the insurer was negligent and that the negligence caused it to suffer a loss. The negligent act at issue plainly arises from the provision of legal services as the Supreme Judicial Court stated in *Real Estate Bar Association for Massachusetts, Inc. v. National Real Estate Information Services (NREIS*, 459 Mass. 512, 535 (2011), that the rendering of a legal opinion on the marketability of title is the practice of law.

In Massachusetts, claims against attorneys are subject to a three year statute of limitations. M.G.L. ch. 260, § 4. The statute specifically provides that all claims for "contract or tort for malpractice, error or mistake against attorneys … shall be commenced only within three years next after the cause of action accrues." M.G.L. ch. 260, § 4. According to the statute, irrespective of whether the theory of liability is based in tort or contract

See HOMEOWNERSHIP page 9

2013 Spring Conference

Monday, May 6, 2013 • 7:30 A.M. – 2:45 P.M.

Four Points by Sheraton

General Information

- Registration to REBA's 2013 Spring Conference is open to members in good standing, as well as guests and non-members for an additional fee. Everyone attending the Conference must register. The registration fee includes the individual breakout sessions, the conference written materials, and the luncheon. We cannot offer discounts for persons not attending the luncheon portion of the program. Registrants are welcome to attend any breakout session at any time and are not required to preregister for the individual sessions.

- Premium credit for professional liability insurance and continuing legal education credit in other states may be given for attending properly documented CLE programs. For details contact Bob Gaudette at (617) 854-7555 or gaudette@reba.net.

- Please submit one registration per person. Additional registration forms are available at www.reba.net, as well as by request to Andrea Morales at morales@reba.net, or by calling (617) 854-7555. Confirmation of registration will be sent to registrants by email. Name badges and a list of attendees will be available at the registration desk.

- Conference registrations should be sent with the appropriate fee by email, mail or fax, or submitted online at www.reba.net, and should arrive prior to April 29, 2013, in order to guarantee a reservation. Registrations received after April 29, 2013, will be subject to a late registration processing fee of $25. Registrations cancelled in writing before April 29, 2013, will be honored and charged a processing fee of $25. No other refunds will be permitted. Registrations cancelled on or after April 29, 2013, will not be honored; however, substitutions of registrants attending the program are welcome. Conference written materials will be mailed within four weeks after the program to those who registered but could not attend.

- The use of cell phones is prohibited in the meeting rooms during the breakout sessions and luncheon meeting. Be sure to visit the lounge areas in the Tiffany Ballroom and Essex/Lenox Room. Refreshments will be served.

- For additional information, please call REBA at (617) 854-7555

Driving Directions

FROM BOSTON:

Take I-93 South which turns into I-95 (Rte 128) North.
Take Exit 15B, Route 1 South toward Norwood.
Continue 4.5 miles down Route 1 South
The hotel will be on your right after the Staples Plaza.

FROM PROVIDENCE:

Take I-95 North to Exit 11B, Neponset Street, Norwood.
Drive 7/10 of a mile and turn left onto Dean Street.
At traffic light, turn left onto Route 1 heading South.
The hotel will be on your right after the Staples Plaza.

FROM THE WEST:

Follow the Mass. Turnpike (I-90) East,
Take Exit 14 onto I-95 (Route 128) South (from the West, it is Exit 14; from the East, it is Exit 15),
Continue South to Exit 15B (Route 1, Norwood),
Continue 4.5 miles down Route 1
The hotel will be on your right after the Staples Plaza.

Registration

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☐ Sliced Beef in a Red Wine Shallot Sauce ☐ Sautéed Chicken & Mushrooms in a Marsala Sauce ☐ Pasta Primavera in a Cream Sauce ☐ None, as I am unable to stay for the Luncheon

Luncheon Keynote Address Presented by Rep. Robert A. DeLeo

Speaker Robert DeLeo will offer insights on the legislative process, as well as a few of his expectations for the current two-year session, in the luncheon keynote address at REBA's 2013 Spring Conference. His 20-plus years of service in the Massachusetts General Court during challenging times for the Commonwealth will provide an important and unique perspective for the REBA audience.

A practicing attorney and long-time REBA member, Representative DeLeo became Speaker of the Massachusetts House of Representatives in 2009. Starting from his acceptance speech, when he vowed to target House rules, ethics, transportation and pension reform, he has set the House on a path to reform. Within 100 days of assuming the Speakership, the House passed sweeping reforms in each of those areas. In one of his first acts as Speaker, he instituted a maximum limit on the Speaker's term, capping it at eight years.

Speaker DeLeo also served as chairman of the House Committee on Ways and Means, the House Committee on Bills in Third Reading, the House Committee on Ethics; and as House chair of the Joint Committee on Local Affairs. Prior to his time on Beacon Hill, DeLeo chaired the Winthrop Board of Selectmen for nine years.

Schedule of Events

7:30 A.M. – 8:30 A.M. **Registration and Exhibitors' Hour**
8:30 A.M. – 1:15 P.M. **BREAKOUT SESSIONS**

8:30 A.M. – 9:30 A.M. **Tiffany Ballroom A**
9:45 A.M. – 10:45 A.M. **Tiffany Ballroom A**

Ethical Conflicts Involved with Serving on Town Boards

David K. Moynihan; Peter Sturges

The panel will outline the authority, structure and operation of the State Ethics Commission, which was established by G.L. c.268B. They will also provide an overview of how G.L. c.268A, the conflict of interest of interest law, applies to persons serving on municipal boards or commissions. The focus will be on the core principles of the law including nepotism, dual loyalty, appearances and the use (or misuse) of a board member's position. The panel will discuss concrete examples and offer practical guidance to ensure compliance with the conflict of interest law.

8:30 A.M. – 9:30 A.M. **Tiffany Ballroom B**
9:45 A.M. – 10:45 A.M. **Tiffany Ballroom B**

Land Court Expands into Limited Assistance Representation

Joanna G. Allison; Hon. Robert B. Foster; Edward Notis-McConarty

The Land Court has promulgated a standing order for LAR. While opening a new vista for representation models, LAR requires an understanding of the LAR rules and certification. This panel will provide the framework and the certification you need to practice LAR in the Land Court.

8:30 A.M. – 9:30 A.M. **Essex/Lenox Room**
9:45 A.M. – 10:45 A.M. **Essex/Lenox Room**

Condominium Conundrums: Dope, Dogs & Disputes

Christopher N. Banthin; Barbara R. Chandler; Clive D. Martin; Diane R. Rubin

The law governing condo unit owners' organizations continues to evolve at a pace congruent with social change in Massachusetts. Medical marijuana became legal in January. The DPH is scheduled to release its regulations on May 1. How will this new world affect condo associations? What can an association board do to protect itself while serving the unit owners? The laws involving service animals have taken some peculiar twists in the last several years. Learn how to address these and other vexing issues facing condo boards.

8:30 A.M. – 9:30 A.M. **Conference Room 102**
11:00 A.M. – 12:00 P.M. **Tiffany Ballroom B**

Current Legislative Topics Important to your Practice

Lisa J. Delaney; Francis J. Nolan; Edward J. Smith

This legislative update will include new legislation drafted by REBA's Legislation Committee (homestead, mechanics lien bonds, co-tenancies, reinstatement of LLCs), as well as bills dealing with the good funds law, pre-Ibanez titles, railroad rights of way, a proposed Marketable Title Act, and other timely issues for practitioners.

8:30 A.M. – 9:30 A.M. **Conference Room 103**
11:00 A.M. – 12:00 P.M. **Essex/Lenox Room**

Effects of Bankruptcy Filing on Commercial Leases

Jennifer V. Doran; Michael J. Goldberg; Michael Holiday

Don't let the bankruptcy of your commercial landlord or commercial tenant take you by surprise. Join REBA's panel of bankruptcy and leasing experts as they guide you through the thicket of current bankruptcy case law and discuss how to protect your clients from the unexpected when drafting and negotiating commercial leases. The panel will also discuss the automatic stay and the assumption, assignment and rejection of leases in bankruptcy proceedings, as well as the calculation of damages when a lease is rejected and the special treatment of shopping center leases in bankruptcy.

9:45 A.M. – 10:45 A.M. **Conference Room 102**
11:00 A.M. – 12:00 P.M. **Conference Room 102**

Probate: Estates & Trusts

Leo J. Cushing; Evelyn J. Patsos

While the MUPC has now been in effect for nearly four years, just last year the legislature enacted a myriad of technical corrections to the law. There are now — literally — hundreds of new points of interest for the probate practitioner. The faculty will offer essential insight into the practical aspects of the MUPC as it continues to unfold and evolve every day since its adoption. The program will place special emphasis on real estate conveyancing under the MUPC with a focus on the recent updates to the REBA Handbook of Standards & Forms.

9:45 A.M. – 10:45 A.M. **Conference Room 103**
11:00 A.M. – 12:00 P.M. **Conference Room 103**

Prompt Pay Law/Mechanics Liens Law Overview Encore
A Practical Skills Session

Kathleen MacNeil; James S. Singer; David E. Wilson

Lenders' lawyers understand the basics of the mechanic's lien law, and the notion of an inchoate lien triggering the need for title updates and lien waivers for each construction advance. However, many lawyers don't truly understand the relationships of the owner, general contractor, subcontractors and materials' providers in today's environment of highly-accelerated construction schedules, just-in-time deliveries and the complexities and interrelationships of the prompt pay law with the mechanic's lien law. Join us for a "boots-on-the-ground" refresher on Chapter 254 liens.

8:30 A.M. – 9:30 A.M. **Conference Room 104**
9:45 A.M. – 10:45 A.M. **Conference Room 104**

LLCs, Nominee Trusts & other Title-Holding Entities
A Practical Skills Session

Harry S. Miller; Donald E. Vaughan; William D. Wagner

Tax issues and protection of clients from personal liability are the predominant considerations when forming a legal entity to conduct a real estate venture. The panelists will explain how to choose the most appropriate vehicle for a new real estate venture, how to manage tax and other issues involving real estate ventures that have been formed as entities other than LLCs, and how/when conversion of an entity into an LLC may be an option to consider.

11:00 A.M. – 12:00 P.M. **Conference Room 104**

I Finally Passed the Bar! Now How Do I Make A Living?
A Practical Skills Session

Rodney S. Dowell; Chiara Urbani LaPlume; Kathleen M. O'Donnell

Real estate has always been an attractive area of law for solo and small firm lawyers, but there are many decisions to be made -whether you are just starting out or you are re-tooling your practice. To help you set up your office on a solid foundation, this program will discuss everything from IOLTA accounts to marketing, client relations to avoiding common pitfalls.

12:15 A.M. – 1:15 P.M. **Conference Room 103 (live presentation)**
Conference Room 102 (video simulcast 1)
Conference Room 104 (video simulcast 2)

Recent Developments in Massachusetts Case Law

Philip S. Lapatin

Now in his 35th year at these meetings, Phil continues to draw a huge crowd with this session. His presentation on the Recent Developments in Massachusetts Case Law is a must hear for any practicing real estate attorney. Phil is the 2008 recipient of the Association's highest honor, the Richard B. Johnson Award.

1:20 P.M.
LUNCHEON PROGRAM

1:20 P.M. – 1:45 P.M.
President's Welcome & Remarks
Michael D. MacClary

1:40 P.M. – 2:15 P.M.
Report of the REBA Title Standards Committee
Richard M. Serkey and Nancy Weissman, Co-chairs

2:15 P.M. – 2:45 P.M.
Luncheon Keynote Address by Rep. Robert A. DeLeo
Speaker of the Massachusetts House of Representatives
Christopher S. Pitt and Michael D. MacClary, 2012 President-Elect

2:45 P.M.
Adjournment

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

The latest skirmish in the ongoing battle over Chapter 40B

BY KATHLEEN M. O'DONNELL

As the initiative petition seeking repeal of the Comprehensive Permit Law (G.L. c. 40B) made its way towards a ballot vote in 2010, opponents sought to limit the application of the law in the courts. In January 2010, the Zoning Board of Appeals for the town of Lunenburg appealed the decision of the Housing Appeals Committee (HAC), overturning the board's denial of an application made by Hollis Hills LLC under Chapter 40B for the construction of 146 condominium townhouses. *Zoning Board of Appeals of Lunenburg v. Housing Appeals Committee*, 464 Mass. 38 (2013).

In July 2010, the Zoning Board of Appeals for the town of Sunderland appealed the decision of the HAC overturning the board's denial of an application made by Sugarbush Meadow for the construction of 150 rental apartments. *Zoning Board of Appeals of Sunderland v. Housing Appeals Committee*, 464 Mass. 166 (2013).

In both cases, the Superior Court ruled in favor the HAC. The *Sunderland* case went to the Supreme Judicial Court on direct appellate review. The *Lunenburg* case was taken up by the Supreme Judicial Court on its own initiative.

Both appeals noted several errors made by the HAC, notably the failure to give adequate weight to the municipality's health and safety concerns, but in both cases the crux of the argument was that the HAC erred by failing to consider the presence of low-cost, market-rate housing, albeit not subsidized, in the towns. Municipalities have argued for years that the HAC should recognize the availability of low and moderate income housing when determining the regional need for such housing. When Gov. Mitt Romney's Task Force on 40B looked at this issue, towns asked the Department of Housing and Community Development (DHCD) to count mobile homes and other low cost housing towards a town's 10 percent level, even if there was no evidence that the mobile homes were occupied by income-eligible families.

Detailed testimony was provided by Lunenburg's expert showing that there was plenty of housing in the town that was sold for prices that would be affordable for low and moderate income households. Eighty-three percent of the apartments in Sunderland were rented at affordable rents. While the SJC did not question these facts, the court went back to the definitions in the statute – Section 20 – "the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected."

"Low and moderate income housing" is defined in the statute as "any housing subsidized by the federal or state government." Apartments might be cheap to rent, and houses might be cheap to buy, at the present state of the market, but that market condition does not meet the low and moderate income housing required under the statute. There is no restriction ensuring that the units remain affordable; there is no lottery to ensure a fair selection of residents. Therefore, the HAC could properly refuse to consider these market conditions when weighing the "regional need for low and moderate income housing" against the health and safety concerns raised by the towns.

While these two decisions were certainly disappointing for the cities and towns that believe that the HAC abused its discretion, I don't think that developers should take these decisions as a blank check. The HAC must consider a town's comprehensive master plan and its implementation of that plan when it balances regional need against local concerns. Has a town designated certain areas for affordable housing; has it supported public and/or private efforts to develop affordable housing in those areas; has it adopted the Community Preservation Act and used CPA funds to encourage the construction of subsidized housing? Is the proposed project in an environmentally sensitive area? Wetlands, rivers and streams, the new flood zone maps, etc. should be examined. Is it in a smart location – near transit, shops, jobs, services? Are there special physical conditions at the site that would create substantially adverse fiscal impacts on the town?

As residential construction (hopefully) starts up again, competition for appropriate sites will increase. Towns will have learned from these two decisions that opposition to an unpopular project will have to focus on the physical facts, not market studies.

A former president of the association, Kathleen O'Donnell has a solo practice in Milton and serves as special counsel to municipal affordable housing trusts and community preservation committees. She can be reached by email at kmeodonnell@verizon.net.

Disability, Social Security benefits and homeownership

BY KARA PLUNKETT

KARA C. PLUNKETT

Federal fair housing laws prohibit mortgage lenders from discriminating against borrowers because they are disabled and in fact, qualifying for a mortgage with Social Security (SS) benefits can be easier than qualifying for a loan with W-2 or self-employment income. Lenders require W-2 employees and the self-employed to prove that they've been "seasoned," i.e., in the same line of work for two years before allowing the borrower to qualify with that income. In contrast, Social Security benefits can be used to qualify for a loan as soon as the individual begins receiving it. This is because the lender can rest assured that the individual will receive the income for as long has he or she is entitled to it.

An individual relying on SS benefits to qualify for a mortgage simply needs to provide the lender with proof of the SS benefit, such as a notice of award or a year-end statement. The Social Security Administration (SSA) distributes payments via direct deposit, so some lenders may additionally require bank statements documenting the monthly deposits. If the individual is receiving benefits on a temporary basis, as is the case with disability benefits, the lender typically requires proof that the benefits will continue for at least three years. Because the SSA periodically re-evaluates disabled individuals and terminates the payments if the individual is found to be no longer disabled, the notice of award does not provide evidence that benefits will be paid for three years. Therefore, some lenders may request a letter from the borrower's personal physician stating that the individual will remain disabled for at least three years but not disclosing the nature of the disability.

Despite this apparent access to mortgage approval, individuals living off of Social Security income face substantial obstacles to homeownership because the dollar amount of the monthly benefit is generally small. There are three types of Social Security benefits, any one of which can be used to qualify for a mortgage.

Social Security Disability Insurance (SSDI) and Social Security retirement pays benefits to disabled or retired workers who have earned credits by working and paying FICA taxes. Unfortunately, even individuals who have worked for many years are denied SSDI benefits. The procedure to qualify for SSDI is a laborious one involving several administrative steps and concluding in a hearing before an administrative law judge (ALJ). An individual seeking SSDI benefits is very often frustrated with process; the initial application for benefits is too often denied by Disability Determination Services and on appeal is often denied by the ALJ. An attorney specializing in Social Security Disability facilitates the process and influences the outcome by collecting medical records, preparing a brief, and arguing the case before the ALJ. The 2013 maximum monthly SSDI/SS retirement payment is $2,533.

Supplemental Security Income (SSI) is a federal income supplement program funded by general tax revenues, not Social Security taxes. Disabled adults and children with limited income and resources are eligible for SSI. The maximum monthly SSI payment is $710. Because the SSDI and SSI benefits are small, unless the borrower has other income, he or she will likely only qualify for a small loan and may not be able to pay a down payment.

However, the full SS benefit is rarely subject to federal income tax and lenders can "gross up" the non-taxed portion of the SS benefit by 125 percent for qualifying purposes. The taxable portion of the SS benefit is determined by the individual's "combined income." An individual's combined income is equal to his or her adjusted gross income plus nontaxable interest plus 50 percent of the SS benefit. An individual receiving SS benefits with a combined income of $25,000 to $34,000 pays taxes on 50 percent of the SS benefit, while an individual with a combined income greater than $34,000 pays taxes on 85 percent of the benefit.

Likewise, a married couple filing jointly, with a combined income of $32,000-$44,000 pays taxes on 50 percent of the benefit and a married couple filing jointly with a combined income greater than $44,000 pays taxes on 85 percent of the benefit.

As noted above, the SS benefit is commonly quite small, thus recipients of SS benefits often do not reach the taxable threshold, providing lenders with the opportunity to "gross up" the non-taxable benefit by 125 percent. For example, if the monthly SSDI check is $1000, and the individual has no other income, he or she doesn't have to pay taxes on it, so the lender might allow that individual to qualify with 125 percent of the $1000, or $1,250.

Although lenders are likely to approve mortgages for borrowers with SS income and gross-up the amount of the mortgage when possible, homeownership can be a daunting prospect for individuals receiving SS income.

One major obstacle to homeownership is that mortgage lenders normally require a down payment of at least 20 percent of the purchase price. If the down payment is less than 20 percent, the lender requires the borrower to buy mortgage insurance. The mortgage insurance company makes sure the lender is paid in full in the case that the homeowner defaults on the loan. In most cases, borrowers buy private mortgage insurance and pay a monthly premium for the insurance.

Many low and moderate-income individuals, like SS recipients, cannot afford a 20 percent down payment so they must buy mortgage insurance to get a loan. However, individuals whose income is too low or whose credit rating is not good enough do not qualify for private mortgage insurance. To help these families get approval for home loans, the U.S. government offers loan guarantees to take the place of private mortgage insurance. Government guarantee loan programs are offered by the Federal Housing Administration (FHA), the Department of Veterans Affairs (VA), and

See HOMEOWNERSHIP page 11

Extending the three-year statute of limitations for legal malpractice claims

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if it is a claim for attorney error, it must be brought within three years of its accrual.

A claim for legal malpractice accrues when the client knows or reasonably should know that it will suffer appreciable harm as a result of the attorney's conduct. Appreciable harm is suffered if the client incurs legal expenses in defending against, or advancing, an issue that is central to the alleged legal malpractice. Once the client is in a position to understand that the attorney's actions caused him some harm, the statute begins to run.

Assuming *arguendo* that M.G.L. ch. 260, § 4 is applicable, where a title insurer alleges that the title agent made an error, the cause of action against the title agent begins to accrue when the title insurer discovers or reasonably should have discovered the error and suffers some appreciable harm. The assertion of a claim by an insured under the title policy would likely trigger the statute of limitations because it would put the insurer on notice of the error and the insurer would presumably begin to incur costs and expenses fixing or responding to the claim under the terms of the policy.

Although a claim arising out of an alleged negligent title certification would seem to fall squarely within the ambit of M.G.L. ch. 260, § 4, in cases where the title insurer filed suit against its agent more than three years after the claim had accrued for purposes of M.G.L. ch. 260, § 4, the title insurer has countered that the claim was not one for malpractice but rather for breach of the agency agreement's indemnification provision thereby triggering a longer six year statute of limitations. In two cases, the Superior Court has agreed.

The Superior Court decisions have opened the door for title insurers to contend that the provisions of the agency agreement substantially extend the life of otherwise time-barred legal malpractice claims. In fact, in some cases, the title insurer contends that the six year statute of limitations does not even begin to accrue until final resolution of the title claim, which can take years. If that is true, the claim against its agent might not be barred for close to a decade after the error is discovered.

Although the argument in support of a longer statute of limitations has had some initial success, unless and until the issue is resolved by an appellate court, both sides of the issue will continue to be pressed. In the interim, title agents should be wary when deciding that a title issue or error is moot due to the passage of time.

A partner in the Boston law firm of Peabody & Arnold LLP, Jen Markowski co-chairs the association's ethics committee. She is a frequent and welcome contributor to *REBA News*. Jen can be reached by email at jmarkowski@peabodyarnold.com.

SJC considers modernizing state law on damages recoverable upon tenant's default

BY LAWRENCE P. HEFFERNAN, JOHN T. RONAYNE, DANIELLE ANDREWS LONG AND KENDRA L. BERARDI

LAWRENCE HEFFERNAN

JOHN TRONAYNE

DANIELLE ANDREWS LONG

KENDRA BERARDI

On Jan. 7, 2013, the Supreme Judicial Court heard argument in *275 Washington Street Corp., Trustee v. Hudson River International LLC, et al.*, SJC No. 11217, an action which poses the issue of remedies and damages available to a landlord upon the tenant's breach of a commercial lease. Under the current common law a commercial landlord has two options in the event of breach by the tenant: allow the lease to remain in effect and recover unpaid rent as it comes due; or terminate the lease, regain possession of the leased premises and forfeit the right to rent due over the remainder of the lease term. Thus, if a landlord terminates the lease upon a tenant's default, it cannot recover future rent, i.e., it cannot recover the benefit of its bargain – a fundamental concept of modern contract law. This approach is grounded in the view that leases are not contracts, but conveyances of property interests. REBA and The Abstract Club filed an *amicus* brief urging the Supreme Judicial Court to adopt the modern view of a lease as a contract and allow the recovery of contract, benefit-of-the-bargain, damages including rents due following the tenant's default.

The case arises out of a 12-year commercial lease under which 275 Washington Street, LLC, leased certain premises at 221-227 Washington St. in downtown Boston to Hudson River International LLC, d/b/a Vital Dent, for use as a dental office. The lease provided that the tenant would pay monthly rent as well as a share of operating costs and taxes.

Vital Dent took possession of the premises, but closed its business about a year later and removed its equipment a little while thereafter. It paid rent for a period of time after vacating the premises, but eventually it stopped paying rent. The landlord subsequently terminated the lease by re-entering and taking possession of the premises. The premises remained vacant for 27 months, after which the landlord re-leased the premises to a new tenant at a lower monthly rent.

In May 2008, the landlord brought an action in Superior Court against the tenant and its guarantor seeking damages including past and future rents for breach of the commercial lease. In cross-motions for summary judgment, the tenant effectively conceded liability for unpaid rent due before the landlord terminated the lease, but contested liability for post-termination damages.

During the pendency of cross-motions for summary judgment, a replacement tenant was found and a new lease was signed at a lower monthly rent. The Superior Court allowed the landlord's motion for partial summary judgment and denied the defendants' motion for partial summary judgment, holding that the landlord was entitled to recover damages for loss of rents and costs once it obtained a new tenant for the premises. The Superior Court eventually entered judgment against the defendants in the total amount of $1,092,653.36, which included the present value of future damages, i.e., the difference between what Vital Dent would have paid and what the new tenant would pay.

The Appeals Court affirmed the finding of liability in favor of the landlord, but vacated the judgment assessing damages and remanded the case for calculation of damages due for unpaid rent at the time the landlord terminated the lease. As for damages following termination, the Appeals Court held that the landlord would have to wait until the end of the lease term to calculate those damages. The Supreme Judicial Court then granted further appellate review.

In recent years, the Supreme Judicial Court has gradually accepted that many lease issues are better resolved under modern contract law rather than older principles governing estates in land. For example: *Boston Housing Authority v. Hemingway*, 363 Mass 184, 197 (1973), "The old common law treatment of the lease as a property conveyance and the independent covenants rule which stems from this treatment have outlived their usefulness;" *Young v. Garwacki*, 380 Mass. 162, 168 (1982), "In the line of cases creating and implying the implied warranty of habitability [this court has] overthrown the … notion that a lease is a conveyance of property;" and *Crowell v. McCaffrey*, 373 Mass. 443, 445 (1979), "Like courts in other states, we have to some extent departed from the concept of a lease as a conveyance…"

REBA and The Abstract Club argued that upon a tenant's breach it is inequitable to force landlords to choose between waiting until the natural termination of the lease to gain possession and recover unpaid rent or immediately terminating the lease to regain possession and forfeiting the right to future losses. This approach is also unfavorable to tenants in that it excuses the landlord from an obligation to mitigate its damages, an obligation which would be imposed upon landlords if the lease were treated as a contract. The current state of Massachusetts law also encourages prolonged vacancies to the detriment of adjacent properties as well as the leased property and permits landlords to lock tenants into economically unproductive situations.

Consequently, REBA and The Abstract Club exhorted the Supreme Judicial Court to take another step towards the modern view of commercial leases as contracts between landlord and tenant and apply it to the analysis of damages available to the landlord upon a breach by the tenant. As the court noted in *Wesson v. Leone Enterprises, Inc.*, 437 Mass. 708, 720 (2002) in its treatment of the independent covenants rule, the concept of a lease as a conveyance of a property interest "no longer comports with the reality of the typical modern commercial lease, which is intended to secure the right to secure the right to occupy improvements to the land, rather than the land itself…" The real estate industry and bar eagerly await the court's decision.

Larry Heffernan, John Ronayne, Danielle Andrews Long and Kendra Berardi are all with the Boston office of Robinson & Cole LLP. They co-authored an amicus curiae brief on behalf of the Association and its sibling organization, The Abstract Club, filed in the Supreme Judicial Court in *275 Washington Street Corp. Trustee vs. Hudson River International LLC, et al.* Email inquiries about this article or the brief can be directed to Larry Heffernan at lheffernan@rc.com.

Annual Walk to the Hill attracts hundreds

REBA leaders gathered in the State House's Hall of Flags prior to the Equal Justice Coalition's 14th Annual Walk to the Hill. Pictured (left to right): Tom Bhisitkul, treasurer; Michelle Simons, president-elect; and Susan LaRose, clerk. Also pictured is Oliver Ames.

REBA leaders joins the Equal Justice Coalition's 14th Annual Walk to the Hill for civil legal aid on Jan. 30. The Walk to the Hill is one of the best-attended lobbying days of the entire legislative calendar. REBA is a long-time co-sponsor of the walks. Pictured (left to right): Michelle Simons, president-elect; Chris Pitt, immediate past president; Mike MacClary, 2012 president; and Mary Ryan, at-large member, board of directors.

Disability, Social Security benefits and homeownership

CONTINUED FROM PAGE 9

the Rural Housing Service (RHS). Individuals with SS income may qualify for one or more of these government insured mortgage programs.

In addition, there are homebuyer and homeowner programs available in Massachusetts, which help low and moderate-income residents buy and repair homes. These programs include low interest mortgage loans, down payments and closing costs assistance, government mortgage payments, mortgage insurance, homebuyer education, and lead paint removal assistance. Cities, towns and non-profit agencies throughout the state offer down payment and closing costs assistance to lower-income homebuyers who can afford monthly mortgage payments, but cannot save enough to pay the initial home purchase costs. These programs are funded by the federal government's American Dream Downpayment Initiative (ADDI), which is part of the federal government's HOME program, a program that aims to increase homeownership among lower income households.

Likewise, the Massachusetts Bankers Association, the State Department of Housing and Community Development and the Massachusetts Housing Partnership designed and administer the Soft Second Loan Program, which helps residents qualify for mortgage loans. Eligibility for the Soft Second Loan Program is determined by income and asset limits, which individuals living off of SS benefits usually meet.

The Soft Second Loan Program splits the loan amount into two parts: a regular first mortgage at market interest rates for up to 77 percent of the purchase price, and a second, subsidized mortgage for 20 percent of the purchase price. The homebuyer pays the principal and interest on the first mortgage. The second mortgage is subsidized with public funds and the homebuyer pays interest-only for the first 10 years.

A homebuyer eligible for a Soft Second Loan also benefits by not having to purchase private mortgage insurance nor pay "points" to banks. The Soft Second Loan program is available only to first-time homebuyers. Fortunately, MassHousing, a state agency offers affordable mortgage loans to both first-time and non-first-time homebuyers.

MassHousing caters to low and moderate-income residents offering them affordable interest rates, low down payment options, low closing costs, MI Plus mortgage insurance, flexible qualifying rations, and 30-year fixed rate loans.

Likewise, the Section 8 Homeownership Voucher Program, funded by the U.S. Department of Housing and Urban Development, allows families with Section 8 vouchers to use their vouchers to help pay the mortgage on a home they buy.

Local public housing agencies decide if they want to partake in this program or not. To be eligible for this program, a household must have an annual gross income of at least $14,500 per year and at least one adult in the family must work full-time and must have been employment continuously during the year prior to receiving Section 8 housing assistance.

Public assistance is excluded when determining eligibility, unless the head of the household or spouse is elderly or disabled, which case the work requirement is omitted and the income requirement is lower. This program recognizes the hurdles to home ownership for disabled individuals and is structured to allow disabled people to overcome those obstacles. The Section 8 Housing Voucher helps pay additional homeownership expenses such as real estate taxes, utilities, and some maintenance and repair.

Fannie Mae and Freddie Mac are private corporations which also have programs designed to assist low income households, including disabled individuals. Fannie Mae MyCommunityMortgages and Freddie Mac Home Possible offer low or no down payment mortgages, and special mortgages for public employees and borrowers with disabilities. To qualify for this type of assistance, the buyer's income must be no more than 100 percent of the HUD area median income or must buy homes in underserved areas (areas with low median incomes and/or high minority populations). Most individuals with SS income are well within the income limits.

While people receiving SSI or SSDI face substantial hurdles to homeownership, there are numerous federal, state, local and non-profit agencies, which make homeownership possible for disabled individuals. These programs provide critical assistance to disabled individuals and benefit the community.

Kara Plunkett is an associate with the firm of Doherty, Cella, Keane & Associates, LLP. She can be reached at kara.plunkett@gmail.com.

I never 'met a data' I didn't like

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HOW IS METADATA TREATED?

The approaches vary from "search away" to "don't look, don't tell."

What's mined is mine: Citing the duty of zealous representation, the ABA has taken the position that it was not an ethical violation for a lawyer to take active steps to review embedded data that had been inadvertently sent by another lawyer, in the absence of an agreement between sending and receiving counsel. The onus of preserving the confidentiality is solely on the sender. There is no additional duty to the sending lawyer, apart from the duty to maintain confidentiality of client information under Rule 1.6. The Maryland Bar concurs, but does not require that the receiving lawyer notify the sending lawyer of inadvertent disclosure, though the receiving lawyer should discuss with his or her client the pros and cons of notifying the sending attorney and/or to take such other action as deemed appropriate.

What's yours is mine, unless one knows or is told not to look: A lawyer receiving documents outside the discovery setting may electronically search for metadata, unless the lawyer knows the metadata were inadvertently disclosed, according to the District of Columbia Bar. The West Virginia Bar concurs, but adds that the receiving attorney should contact the "sending lawyer to determine whether the metadata includes work-product confidences." The Colorado Bar follows a similar approach. unless the recipient "knows or reasonably should know" that the metadata contains or constitutes confidential information, in which case that lawyer must contact the sending attorney and attempt to resolve the matter.

We're not sure whose is whose, so look before you leap: The Pennsylvania Bar lets the receiving lawyer use his/her discretion whether to review metadata on a "case-by-case" basis, keeping in mind duties under Rules 1.1-1.4, which includes zealous representation. The receiving lawyer must then determine whether to use the data received as a matter of substantive law; must consider the potential effect of doing so on his/her client's matter; and should advise and consult with the client about the appropriate course of action.

No mining allowed: You should know better! The New York Bar said that a receiving lawyer "may not ethically take advantage of a breach in [an opposing] attorney's care by intentionally searching the metadata." The Alabama and Arizona bars concur. The Maine and Florida bars prohibit a recipient from reviewing metadata that the recipient should reasonably know was not intentionally communicated. The New Hampshire Bar found that the receiving attorney has an obligation not to review or mine for presumably inadvertently-sent metadata, and shall promptly notify the sender and not examine the materials.

WHERE DOES MASSACHUSETTS COME IN?

Massachusetts has not directly addressed the issue, but the issue of the inadvertent transmission of confidential information was somewhat determined in *Purcell v. Dist. Att'y for Suffolk Dist.*, 676 N.E.2d 436 (Mass. (1997)), holding that certain disclosed information even though no longer confidential was still privileged and so inadmissible at trial. There is no Rule of Professional Conduct directly on point, but Rules 1.6 and 4.4 will be brought to bear. The MBA Ethics Committee advised that a lawyer should represent a client "zealously within the bounds of the law" and should, therefore, refuse to return the material, even when a claim of privilege is made. The lawyer should retain the material and let the court sort it out.

Massachusetts has generally applied a rule of waiver of privilege that asks whether the person who sent the material took "adequate steps … to ensure" the confidentiality of the material that was nevertheless inadvertently released.

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