REBA news
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Robert M. Carney (right) presents the Richard B. Johnson Award to Edward M. Bloom at the 2016 REBA Spring Conference Luncheon.

Former REBA President Bloom honored with Johnson Award

Former REBA President Edward M. Bloom was given the Richard B. Johnson Award at May's all-day spring conference in Norwood. Established in 1977, the Richard B. Johnson Award is the association's highest honor.

The lifetime achievement award recognizes the recipient's outstanding and selfless contributions to advancing the practice of real estate law. The award was created to honor Richard B. Johnson, a highly regarded, even revered figure in the legal community following his distinguished service in World War II. Award recipients have included members of the judiciary, former REBA officers, members of the Land Court's legal staff and distinguished real estate lawyers.

A past president of REBA, Ed co-chairs its Amicus Committee and is a past chair of its Commercial Leasing Committee. In addition, he is a past president of the Abstract Club and a past chair of the Boston Bar Association's Leasing Committee.

A partner at Sherin & Lodgen, Ed practices in the firm's real estate department and concentrates in the development, sale, leasing and mortgaging of office, shopping center, industrial and condominium properties. For over 40 years, Ed has chaired and lectured at numerous real estate seminars for Massachusetts Continuing Legal Education, the Boston Bar Association, the Abstract Club and REBA. He provided the yearly

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REBA launches new committee

Practice concentration on residential landlord/tenant

At REBA's Spring Conference in Norwood, President Susan B. LaRose announced the launch of the association's newest practice concentration committee, the Residential Landlord/Tenant Committee.

The financial crisis and resulting upsurge in mortgage foreclosures has brought major changes in decisional law relating not only to real estate foreclosures, but in post-foreclosure occupancy issues.

"We expect that REBA will become the bar association home for all who practice residential landlord/tenant law," LaRose said.

The REBA Landlord/Tenant Committee will be a resource and forum to its members to discuss and share current information about landlord/tenant practice matters. Committee members will post matters of interest on the REBA Blog, and LinkedIn and Facebook pages.

Working with the Legislation Committee, the group will counsel REBA members about legislative and case law developments while providing expertise and input regarding proposed legislation affecting the residential landlord/ tenant areas of Massachusetts law. The group will also support the association's Continuing Legal Education Committee in hosting relevant programs at REBA's twice-yearly conferences, including an hour-long breakout program on recent developments in landlord/tenant law scheduled for the all-day Annual Meeting and Conference on Monday, Nov. 7.

Emil Ward of Ward & Associates in Brighton and Kenneth A. Krems, a partner at Boston's Shaevel & Krems, will co-chair the new committee.

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Ward joins association's Dispute Resolution panel

Brighton attorney G. Emil Ward has joined REBA Dispute Resolution. Over his three decades of practice, Emil has developed a broad-based transactional and litigation practice with a concentration in residential landlord/tenant matters.

In addition to his general practice, Emil has mediated disputes in a variety of real estate fields, including landlord/tenant conflicts. He brings his broad experience as a practicing attorney to REBA/DR, having represented clients in property partition cases, premises liability, partnership dissolutions, easements, housing discrimination, condominium disputes, mortgage foreclosure and title issues.

"Emil will bring the same pragmatic common-sense approach that has made him a successful practitioner to the mediation arena," said REBA/DR's Peter Wittenborg. "He's a welcome addition to our roster."

G. EMIL WARD

Emil has taught at Suffolk University Law School and Boston University Paralegal School. He has been a guest commentator for several television programs and has given interviews regarding rent control and landlords' and tenants' rights. He was also a guest contributor for over a year on "Real Estate Radio" on WBZ radio.

> "Emil will bring the same pragmatic common-sense approach that has made him a successful practitioner to the mediation arena."
>
> — Executive Director Peter Wittenborg

Emil has testified before the Legislature on various real estate bills. He has written pamphlets summarizing the rights of landlords and tenants for the state and for the Massachusetts Association of Real-

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Dear young people: don't be afraid of a 30-year mortgage

BY PAUL F. ALPHEN

You have seen the commercials in which a millennial couple expresses trepidation, and horror, at the thought of entering into a 30-year mortgage and owning a home.

I get it; younger people are more transient than previous generations, and they want to have the ability to relocate when the opportunity presents itself. They were also witnesses to the carnage that befell the real estate market caused by credit default swaps. Both are excellent reasons to be wary of owning real estate, but not necessarily reasons to fear and avoid homeownership.

Interest rates are ridiculously low right now. We have no reason to believe that they are going to stay low forever. An interest rate of 4.1 percent is not free; on a $250,000 mortgage the interest over a 30-year term comes to $184,878.53. But the monthly payment is only $1,208. It's a bargain, IF you listen to the advice of your grandfathers and grandmothers:

1) Don't be showy.

Buy a modest house that will not make you "house poor." A house is like a hungry animal; it has to be fed. The larger the house, the more money it eats: more area to heat, larger utility bills, more things to go wrong, more space to clean and maintain. A modest house is more likely to have modest expenses.

2) Buy the worst house on the best street.

Add value to your own home by riding the appreciated value created by your neighbors (as well as keeping your house in good condition). Remember the three most important rules of real estate: location, location, location.

3) Get a good home inspection before you commit yourself to a purchase.

Without one, you could end up with a house with rotting sills, terminate infestation, dangerous wiring or temporary jacks in the basement being used to hold the house up.

4) Learn how to care for your home.

Wood is a living, breathing thing. It expands, shrinks and rots. Learn to paint and acquire other cost savings skills. Electricians and plumbers can be remarkably inexpensive, so I don't recommend do-it-yourself electrical work, but it can be very rewarding to refinish a room or replace a dishwasher by yourself. Keep a slush fund handy, however, so that you can replace the water heater and the roof.

5) Put some equity in your home.

Take the advice of the conservative lenders and try to put 20 percent down. Not only is that a great psychological tool that will bond you to your home, but it can be an important safety net in the event of a dive in the market. Take my word for it: Some late night, when it's dark, quiet and freezing, and you are walking back down your driveway after leaving the recycling bin at the curb, you will stop and look at your house in the glow of the street lights and say to yourself, "That's my home."

6) Build some equity in your home.

Making regular extra payments will reduce the term of your mortgage and provide a tool for helping your kids with the cost of college tuition someday (or some other worthwhile endeavor).

7) Don't be afraid of the thought of THIRTY YEARS.

Chances are you will move a few times, and refinance a few times. Your real estate attorney will make the process of paying off your mortgage at the time of a sale or refinance painless. Don't worry about the mechanics of the process; we've got it covered.

8) Hang happy pictures in your home.

Create a bulletin board, updated regularly with pictures of birthdays, holidays and other joyous family events. It will remind you that as your family evolves, the walls around you stand firm to keep you all safe, warm and together. Your house will become part of your family and the trepidation of the scary 30-year mortgage will fade.

I get it; younger people are more transient than previous generations, and they want to have the ability to relocate when the opportunity presents itself.

And keep in mind that if you own your own house or condo, there are added benefits that have value beyond dollars and cents: having no landlord; being free to drill holes in the wall to mount your 55-inch flat screen; and painting your TV room to look like the Green Monster.

A former REBA president, Paul Alphen currently serves on the association's executive committee and co-chairs the long-term planning committee. He is a partner in the Westford firm of Alphen & Santos, P.C. and concentrates in residential and commercial real estate development, land use regulation, administrative law, real estate transactional practice, and title examination. As entertaining as he finds the practice of law, Paul enjoys numerous hobbies, including messing around with his power boats and fulfilling his bucket list of visiting every Major League ballpark. Paul can be reached by email at palphen@alphensantos.com.

Criminal history screening procedures focus of newly issued HUD guidance

BY KENNETH A. KREMS

HUD's Office of General Counsel issued guidance on April 4 relative to the Fair Housing Act and landlords using criminal history as a basis for denying applicants for housing. Among other things, the Fair Housing Act, 42 U.S.C. §3601 et seq., prohibits discrimination in the rental of apartments on the basis of race, color, religion, sex, disability, familial status or national origin. As a result of HUD's guidance, attorneys representing residential landlords should advise them to review their qualifying criteria and standards for rejecting applicants.

There are two types of discrimination: intentional discrimination and disparate impact/discriminatory effect, which occurs when a neutral policy or procedure has a disproportionately negative impact on a protected class. In 2015, the U.S. Supreme Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, recognized that the disparate impact theory applies in fair housing cases, and the HUD guidance concentrates on this type of discrimination in the context of criminal history.

It points out that as many as 100 million adults in the United States have a criminal record and that it is important for individuals released from incarceration to be able "to access safe, secure and affordable housing." Applicant screening policies that disqualify individuals who have been arrested or convicted of a crime have a disproportionately negative effect on African Americans and Hispanics who are arrested and convicted at a rate much higher than that of the general population.

Landlords generally refuse to rent to applicants with an arrest or conviction because they believe that they are more likely to pose a risk to ten-

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REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

295 Devonshire Street, Sixth Floor,
Boston, MA 02110-1266
www.reba.net

MISSION STATEMENT

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

MENTORING STATEMENT

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

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In with (a lot of) the new

President's Message

SUSAN B. LAROSE

In this message, I want to report on some new initiatives that our officers and board are working on to broaden the reach of our association and enhance membership experience.

We recently concluded our Spring Conference, where I shared with our attendees the news of these initiatives. Of course, the highlight of the conference was giving Ed Bloom, who has so enriched our community, REBA's highest honor, the Richard B. Johnson Award.

First, we are launching the Residential Landlord/Tenant Committee, a new practice concentration committee spearheaded by Board Clerk Diane Rubin. The financial crisis and resulting upsurge in mortgage foreclosures has brought major changes in decisional law relating not only to real estate foreclosures, but in post-foreclosure occupancy issues.

At our Spring Conference, Jordana Greenman and Emil Ward offered us insights into this fast-changing area of the law. I am delighted to report that Emil, together with Ken Krems, will co-chair this new committee. We expect that REBA will become the bar association home for all who practice residential landlord/tenant law.

To join this new committee, which will host its initial meeting in September, just contact any member of the REBA staff at admin@reba.net or (617) 854-7555.

We real estate lawyers (some of us with reluctance!) must embrace the social media revolution. Earlier this spring our board voted to bring social media platforms to REBA, including active LinkedIn and Facebook pages and an active blog covering all real estate practice areas. To oversee our social media activities, we have established the Strategic Communications Committee. Kim Bielan and Julie Barry will lead this new operational committee.

Our blog and our new social media platforms will thrive only if our members participate and offer opinions and comment. I'm sure Kim and Julie will be reaching out to many members with an invitation to author short opinion content for the blog or our social media platforms.

Looking ahead, our leadership plans to rename our practice concentration-related committees to become sections. The label "section" is a better signifier of the greater inclusiveness and broader educational and practice-development mission of these groups. Of course, it will also align REBA with our sibling associations, the MBA and the BBA. In a nearby article we have offered more detail for this new nomenclature.

Before the end of this year, we will launch a new website, long overdue, with expanded user-friendly features. I am grateful to President-elect Fran Nolan for working with IT Manager Bob Gaudette to keep this major new project on track. At the half-way mark of my term as president, I continue to be amazed at the accomplishments of our incredibly dedicated staff! I must thank Nicole Cohen, Andrea Morales, Bob Gaudette and Peter Wittenborg.

Finally, looking far ahead, REBA, known for many years as the Massachusetts Conveyancers Association, will celebrate its sesquicentennial in 2021!

Ward joins REBA's panel of mediators

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tors, for which he served as a consultant and taught landlord and tenant courses.

Emil has spoken at seminars for REBA and MCLE at which where he discussed the impact of the new medical marijuana laws on residential landlords.

Emil has authored two books on landlord-tenant law. He published a treatise/cum practice manual on the subject in 1996 entitled "Massachusetts Landlord-Tenant Practice: Law and Forms." The second book, available on Amazon, is entitled "Massachusetts Landlord-Tenant Practice: Law and Forms; Security Deposits and Last Month's Rent" and focuses on how to avoid violating the law, treble damages and attorneys' fees if you have breached the security deposit laws.

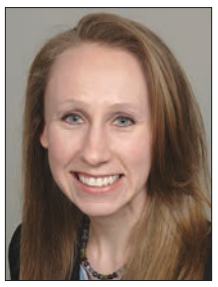
To schedule a mediation with Emil Ward, contact Andrea Morales at morales@reba.net.

For more about REBA Dispute Resolution go to www.disputesolution.net.

Visit us online
www.reba.net

Electrons in space

The adventures of Lisa Lawyer in the 21st century

BY JAMES S. BOLAN AND SARA N. HOLDEN

Why is it that electrons on a screen can bind a contract, but not permit you to have a "virtual office" in the state next door? Is an electronic text message now sufficient to constitute a writing under the Statute of Frauds to create an enforceable contract for the sale of land? According to the Land Court, the answer is yes.

Following the line of precedent from *McCarthy v. Tobin* through *Feldberg v. Coxall*, it is now established that e-mail exchanges between the buyer and seller's attorney were sufficient evidence of a binding contract, under the "e-sign law," c. 110G. The formation of a valid contract requires an offer, acceptance of that offer, consideration, and agreement on sufficient terms laying out the rights and obligations of the parties.

An enforceable agreement requires (1) terms sufficiently complete and definite, and (2) a present intent of the parties at the time of formation to be bound by those terms. When the intent of the parties establishes agreed-upon material terms of a sale, it may be inferred that the purpose of a final document which the parties agree to execute is to serve as a polished memorandum of an already binding contract. Now, for the purposes of satisfying the Statute of Frauds, a text message, the manifestation of electrons on a page, can suffice.

Now, for the extended analogy:

When last we wrote about VLOs (virtual law offices, as opposed to brick-and-mortar offices), a lower court in New York decided that a non-resident lawyer admitted in the state but living in New Jersey could practice remotely in New York. However, the 2nd Circuit reversed, determining in *Schoenefeld v. Schneiderman* that the state law requiring "non-resident" New York bar members to maintain an in-state office if they wish to practice in New York state courts is not unconstitutional. Therefore, in order to practice law in New York, one must embrace brick and mortar, and not just electrons on a screen.

According to the 2nd Circuit, residency requirements are not protectionist, and thus do not violate Article IV, Section 2, Clause 1, the Privileges and Immunities Clause, also referred to as the Comity Clause, which prohibits discrimination in one state against the citizens of another state.

Think of the obverse position: A New York-admitted lawyer can stay at home, in a lawful home office, never having to lease space in Manhattan, and practice law. But a New York-admitted law, also admitted in New Jersey, cannot do the same.

So, the requirement that a lawyer admitted in New York and New Jersey must maintain an office in both places and not "tele-commute" or engage in any other arguably lawful means of communication electronically remains firm in that New York state of mind.

Does the call of prime office space in Providence, Rhode Island or Manchester, New Hampshire wane?

Is it arguable that the failure to maintain a physical office in a jurisdiction in which one is admitted could be viewed as the Unauthorized Practice of Law? If so, does your non-lawful status affect the contracts that you just entered into electronically?

We don't think or expect so. Virtual offices exist everywhere. Documents are maintained in cloud servers, as are time and billing, emails, payment systems, conflict checks and all other modalities for running a practice. Home offices abound and VP's (virtual private networks) are regularly used to allow counsel and clients to communicate in the ether. And, all ethics rules apply within brick walls and electronic media.

So, where does this leave us? The New York ruling reinforces the fear that regulators will not be able to "lay hands" on lawyers who practice within its borders. The dissent in the opinion made clear that protectionism, not regulation, was the majority's driving force.

Nationwide bar exams or multi-jurisdictional licensure remains an electronic dream for another day.

Comity? Not quite. And as Groucho said, "There ain't no Sanity Clause" – yet!

Jim Bolan and Sara Holden are regular columnists for REBA News, focusing their articles on practical legal and malpractice advice for transactional lawyers. Both are partners in the Newton firm of Brecher, Wyner, Simons, Fox & Bolan. Bolan can be reached by email at jbolan@legalpro.com; Holden can be reached at sholden@legalpro.com.

Risks and rewards of protective safeguard endorsement

BY EDWARD M. BLOOM

Almost all property owners' insurance policies contain various endorsements covering such matters as rent insurance, business interruption, service interruption, liquor liability, flood and earthquake, plate glass and terrorism insurance. But an endorsement called a "protective safeguards endorsement" reduces the insurance premiums on the policy but can cause the loss of all insurance coverage if the owner fails to abide by its terms and conditions.

This benign and upbeat-sounding endorsement provides the insured owner with an insurance premium reduction if the owner has installed or is operating an automatic sprinkler system, fire alarm system, security system, service contract providing private fire protection or any other items (such as an automatic commercial cooking exhaust and extinguishing system for restaurants) that can be specifically listed on the endorsement.

However, there is significant danger looming in this endorsement because it provides that the insurer "will not pay for loss or damage caused by or resulting from fire, if prior to the fire, [the insured] … knew of any suspension or impairment in any protective safeguard listed in the Schedule … and failed to notify [the insurer] … or failed to maintain any protective safeguard … over which [the insured] had control, in complete working order."

The upshot is that the owner can lose all insurance coverage if its policy contains this endorsement and the insurer can prove that the owner "knew of any suspension or impairment" or "failed to maintain any protective safeguard."

What's worth the risk?

So in what ways can an owner run afoul of this language? The answer, unfortunately, is in many ways, without even realizing it. For example, if an owner allows a tenant to make minor interior alterations under its lease without landlord approval, the tenant may install a wall or relocate some portion of the sprinkler system so that the system does not operate properly thereafter. If a fire occurs, the owner may lose its insurance coverage.

Likewise, if a tenant or landlord, during a remodeling of space, shuts off a sprinkler system for a few days (without notifying the insurer) and a fire occurs, the owner again may lose its insurance coverage. As another example, if a tenant has a use clause that allows it to use its premises for any lawful purpose and the tenant changes its use of the premises, the existing sprinkler system may be compromised by alterations made to the premises to accommodate the new use by the tenant. If a fire occurs, insurance coverage may be denied.

Given the examples set forth above, what can an owner do to protect itself? To begin with, the owner should determine if its policy includes a protective safeguard endorsement. If it does, the owner should decide whether the savings in premium costs are worth the risk inherent in the endorsement. If the

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Beware of scams targeting real estate attorneys

BY NOEL M. DICARLO

To hackers, we are all walking around with a bullseye on our back. It's that plain and simple. Real estate lawyers, particularly conveyancers, transfer large amounts of money on a daily basis, and sometimes operate with sub-par and outdated cyber security systems. If you and your clients are the target of any of these hackers and scam artists, you could face losses of six figures or more.

The days of the obvious scam emails from a Nigerian prince seeking your aid in securing his rightful legacy have long passed. Today's scammers are far more sophisticated and savvy. Let's examine the three most common: the Compromised Wire Instruction Scam, the Counterfeit Check Scam, and the Forged IOLTA Check Scam.

Compromised Wire Instructions

The most prevalent and alarming scam targeting real estate lawyers involves compromised wire instructions, also known as the Business Email Compromise (BEC) or the "Man in the Email Scam." The FBI has estimated the losses from these scams at over $2 billion in 2015.

In this scenario, you receive emailed wire instructions from the seller. The deed goes on record, and you wire the funds pursuant to the wire instructions emailed to you. The seller then calls looking for her sale proceeds that have not yet hit her account, despite the fact that they left yours. As it turns out, the wire instructions you received were not for the seller's account.

The message came from an email address that was very similar to the seller's address, but you would have to be looking very closely to realize that it was slightly different. There are, of course, many variations on the same theme: The hackers targeting real estate lawyers, hack into email accounts and monitor them for a period of time tracking a transaction that involves a transfer of money. At the moment in the deal that wire instructions are requested, the hacker makes his move and provides false instructions. If the wire instructions were already sent by the correct party, the hacker may wait some time then send a subsequent email acting as the party stating that they want to change their previous email instructions and wire the funds to a different account. Once the money leaves your account, the funds are lost and the bank may not liable, because it merely followed your instructions.

Hackers particularly like to strike on the Friday before a long weekend, at the end of the month, or the days before a holiday: all times when they know that conveyancers are overloaded, busy and may overlook small details.

Here are some red flags you should look out for:

1) Wire requests and instructions received on a Friday, especially a Friday before a long weekend, or the day before a holiday;

2) any revisions to wire instructions previously provided;

3) wires to foreign countries;

4) changes in the email addresses or the look of an email from prior email messages; and/or

5) a sense of urgency by the requestor or beneficiary.

Counterfeit Check

In the counterfeit check scam, a new client contacts your office seeking representation. You may even have several telephone calls with the would-be client, then proceed to send over an engagement agreement.

It is important to note that these scammers are incredibly informed on the would-be deal. They can be very convincing. They will then send you a seemingly legitimate bank cashier's check for a retainer. You deposit the check into your IOLTA account. Shortly thereafter, the client contacts you and tells you that the matter is resolved or that they no longer require representation. They instruct you to deduct any amount for legal fees accrued and to wire the remainder back to them. You follow the client's instructions and two to three days later, your bank tells you that the check was counterfeit and that you are responsible for the shortfall.

Some banks make "funds immediately available" as an accommodation to conveyancer clients, but it is important to understand that this is a "provisional credit" only. If the check does not clear (which can sometimes take up to 10 days), the bank will retract the credit. Again, your bank is not liable because they simply followed your wire instructions.

Forged IOLTA Check

Think of how many IOLTA checks you circulate on a daily basis, and how many municipalities, organizations and people have access to those checks. The forged IOLTA check scam, like the previous fraud, involves very good counterfeit checks. These checks are so artfully forged that even the experts may have a difficult time catching the forgery on its face. The scammer will obtain the account and routing number from your check or wire instructions and then create a fake check payable to "cash."

There are more than these three scams lurking around, including malware that makes dummy websites nearly identical to bank sites in order to steal your login information. All of these scams however, have one thing in common: they want to steal from you and your client. Conveyancers beware.

Noel DiCarlo is a partner in the firm of Warshaw & DiCarlo, located in Boston's Back bay. A member of the association's Board of Directors, she concentrates her practice in real estate and personal planning. She represents buyers, sellers, investors and lenders in the purchase or sale of primary and second homes and condos, as well as builders constructing new homes or converting residential property into condominiums. She can be contacted at ndicarlo@warshawlaw.com.

Notary Bill is solution to acknowledgment muddle

BY MICHAEL J. GOLDBERG

In Part 1 of this two-part article, the author reviewed the state of the law in the Bankruptcy Courts (and in appeals of Bankruptcy Court decisions) regarding the effect of technical defects in mortgage acknowledgements. At least two guiding principles can be derived from those decisions:

• The omission of the name of the mortgagor from the acknowledgement renders the acknowledgement fatally defective, and the mortgage avoidable by a Chapter 7 trustee; and

• insertion of the wrong name in the acknowledgement leads to the same result.

As the article pointed out, however, the state of the law concerning power-of-attorney (POA) acknowledgements is less clear. In *Weiss v. Wells Fargo Bank* (*In re Kelley*), the Bankruptcy Appellate Panel for the 1st Circuit invalidated a POA acknowledgement. 498 B.R. 392 (B.A.P. 1st Cir. 2013). In its opinion, the BAP focused on what it saw as ambiguity regarding whether the phrase "signed it voluntarily for its stated purpose" referred to the principal, rather than the holder of the power.

But in *HSBC Bank v. Lassman* (*In re DeMore*), the U.S. District Court rejected the notion that an acknowledgement is intended to constitute evidence of the principal's free act. 2016 WL 94249 (D. Mass. Jan. 7, 2016). Stating that the lower court had given insufficient weight to the duly-executed power of attorney, the District Court upheld a POA acknowledgement that the BAP, in *Kelley*, might well have rejected.

Members of the Real Estate Bar Association are well aware of REBA's efforts, working with the Legislature, to give Executive Order No. 455, regarding forms of notary statutory status. The most recent version of REBA's notary bill (the "Notary Bill") has been resubmitted for legislative consideration, and was passed by the Senate as S 2064 in November. The Notary Bill is currently before the House Ways and Means Committee, and REBA and its Legislation Committee remain hopeful that its enactment is in prospect. Such enactment, and the codification of a presumptively valid form of acknowledgement, will certainly help clarify some of the confusion in the decisions.

In the meantime, the Legislation Committee has taken a closer look at the bankruptcy decisions, and has made a number of changes to the Notary Bill that, if enacted, will reduce, if not entirely eliminate, the issues that have arisen in the acknowledgement cases. The central change is in Section 15(b) of the Notary Bill, which contains the presumptively valid form of acknowledgement. The proposed acknowledgement, which is designed to be used for all acknowledgements, including those by persons executing documents in a representative capacity, takes the following form:

On this ___ day of _____, 20__, before me, the undersigned notary public, _____ (name of document signer) personally appeared, proved to me through satisfactory evidence of identification, which we re _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose.

(as partner for _____, a partnership)

as _____ for _____, a corporation or other entity)

(as attorney in fact for _____, the principal)

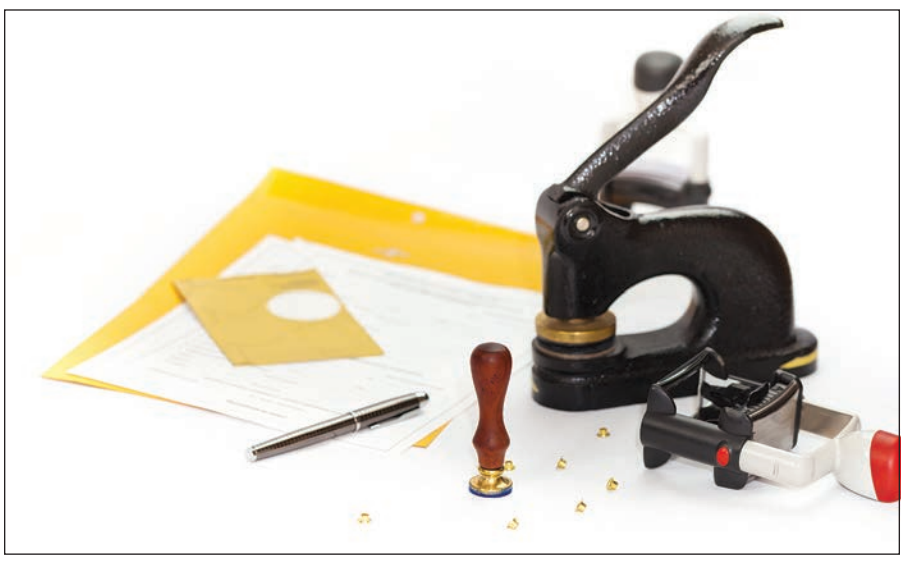
(as _____ for _____, (a) (the) _____)

as the voluntary act of the (partnership) (corporation or other entity) (principal) (_____).

_____ (official signature and seal of notary public) (Emphasis supplied.)

The new language, which appears above in italics, follows the recommendation in Part 1 of this article. With the addition of this language, the Notary Bill makes clear that a POA acknowledgement refers to the free act of both the principal and the agent, thus resolving the issue that has been troubling the bankruptcy courts in the *Kelley* and *DeMore* decisions.

But the revisions to the Notary Bill do not end with the change to the acknowledgement form. Section 3 of the Notary Bill would amend G.L.c. 183 by



allowing a defect in the acknowledgement of a deed or mortgage to be addressed with the filing of an affidavit under G.L.c. 183, §5B. Proposed Section 38A of Chapter 183 would provide as follows:

Notwithstanding any provision of this chapter to the contrary, an affidavit executed and recorded pursuant to section 5B of this chapter, attesting to the proper acknowledgment of a recorded document containing an acknowledgment clause that omits the name of the party whose signature was acknowledged or otherwise includes a material defect, shall provide constructive notice of the existence of the document to a bona fide purchaser, either independently or in combination with the document.

The Notary Bill is currently before the House Ways and Means Committee, and REBA and its Legislation Committee remain hopeful that its enactment is in prospect.

Thus, the new provision would allow a 5B affidavit to provide constructive notice with respect to a problematic POA acknowledgement — and the new provision would also allow a 5B affidavit to constitute constructive notice of an acknowledgement that failed to include the name of the party executing the document, or contained the wrong name, or had a wide range of other defects.

Notably, the ability of a 5B affidavit to achieve these ends is a question now before the Supreme Judicial Court, having been certified to the SJC by the 1st U.S. Circuit Court of Appeals in *Bank of America v. Casey* (*In re Pereira*), 791 F.3d 180 (1st Cir. 2015). Passage of the Notary Bill would make clear that, regardless of the SJC's decision, 5B affidavits can be used to correct technical acknowledgement problems – and would help to eliminate many of the uncertainties surrounding the validity of mortgages that have recently troubled the bankruptcy courts.

An additional section of the Notary Bill would amend G.L.c. 158, §58 by providing that, with respect to registered land, a deed, mortgage or other instrument accepted for filing constitutes constructive notice to all persons regarding title to the land affected by the instrument. This provision, if enacted, would essentially eliminate future bankruptcy court challenges by trustees to defective acknowledgements in mortgages on registered land.

Finally, Section 2 of the Notary Bill would, if enacted, address documents notarized in jurisdictions that do not share the Massachusetts requirement of a reference to the voluntary nature of the transaction. That provision would amend Section 42 of Chapter 183 by making valid a notarial certificate made in another jurisdiction provided that the certification is in compliance with the laws of that jurisdiction. This provision addresses the growing trend, in states other than Massachusetts, to eliminate the voluntariness language from acknowledgements (see, e.g., the 2010 Revised Uniform Law on Notarial Acts).

On two occasions, the Bankruptcy Court has ruled acknowledgements without expressions of voluntariness, in mortgages of state property, defective. See *In re Shubert*, 535 B.R. 488 (Bankr. D. Mass. 2015) and *In re Resnikov*, 2016 WL 1238916 (Bankr. D. Mass., Mar. 29, 2016). The Notary Bill would ensure that these decisions are not applied to acknowledgements from a state which did not require "voluntary act" language, by giving full faith and credit to other jurisdictions' forms.

In sum, the changes to the Notary Bill that have been drafted by REBA's Legislation Committee will go a long way — possibly all the way — to ending the recent flood of bankruptcy cases invalidating mortgages because of acknowledgement problems. What remains now, of course, is to wait to see whether the Massachusetts Legislature is prepared to permit those changes to become law. While we wait, practitioners preparing acknowledgements should continue to use caution in preparing their forms. In the case of POA acknowledgements, practitioners would be well advised to use the language recommended by this author in Part 1 of this article, and incorporated by REBA's Legislation Committee in the proposed form of acknowledgement above.

A member of the REBA Legislation Committee, Mike Goldberg is a partner at Casner & Edwards, where he specializes in the areas of business bankruptcy, financial restructuring and business transactions (in particular, real estate financing transactions). Mike was the principal draftsman of the REBA-sponsored 2011 overhaul of the Massachusetts Homestead law, incorporating the concept of automatic homestead. He can be contacted at Goldberg@casneredwards.com.

Land Court issues two important foreclosure decisions

BY JULIE TAYLOR MORAN

Both cases discussed below involved attempts by mortgagors to resurrect and prevail on a familiar list of challenges to the validity of the foreclosure of the mortgage. In both cases, the courts demonstrated an abundance of patience, painstakingly reviewing each allegation and citing applicable decisions, applicable law or practice in each instance, rejecting the attempts by the mortgagors to persuade the court to declare the foreclosures invalid.

In *Citibank, N.A v. Glowacki*, MISC 12-469108, the Land Court had previously denied plaintiff Citibank's first motion for summary judgment, but not before taking the opportunity to affirm, among other issues, that the bank was the valid holder of the mortgage at the time of the sale on March 7, 2012.

Judge Howard P. Speicher reminded the mortgagor that the decision in *Eaton v. Federal National Mortgage Association*, 462 Mass 569 (2012) had disposed of these arguments; it was prospective in nature applying only to notices of sale given after June 22, 2012.

Citibank then filed a renewed motion for summary judgment, which the court allowed and proceeded to systematically reject the balance of the foreclosure challenges raised by the mortgagor. Those included allegations that the "right to cure" notice did not comply with the requirements of G.L.c. 244 §35A. The court upheld the validity of the notice, citing the Supreme Judicial Court decision in U.*S. Bank National Association v. Schumacher*, 467 Mass 421 (2014), holding that Section 35A did not relate to the foreclosure process by exercise of the power of sale, which requires strict compliance with the applicable provisions.

The court declined to review the merits of whether the default notice required to be sent under paragraph 22 of the mortgage strictly complied with the language in the mortgage as required by the holding in *Pinti v. Emigrant Mortgage Company, Inc.*, 472 Mass 226 (2015), as that decision was prospective in nature, requiring strict compliance for any such notices mailed after July 17, 2015. Finally, the court reviewed the substance of the mortgagor's claim that the postponement of the sale was flawed and found it satisfactory.

The court dismissed the argument that MERS, the original holder of the mortgage, had no authority to subsequently assign the mortgage, citing longstanding favorable case law and the specific language of the mortgage.

Similarly in *Campbell v. Federal National Mortgage Association*, MISC 12-469212, Land Court Judge Alexander H. Sands III patiently slogged through a litany of the same familiar foreclosure challenges to the foreclosure sale held on June 4, 2012. The court quickly rejected the mortgagor's various challenges to the form of assignment of mortgage, such as lack of recitation of consideration (not required) or not listing the address of mortgagee or name of mortgage broker (not render assignment invalid).

The court dismissed the argument that MERS, the original holder of the mortgage, had no authority to subsequently assign the mortgage, citing longstanding favorable case law and the specific language of the mortgage. It also affirmed the authority of the party assigning the mortgage on behalf of MERS to do so, pointing out that the signatory, an assistant vice president and secretary, was a party purporting to hold that office and thus was authorized by G.L.c. 183 §54B to execute the document.

Judge Sands then cited both the actual holding of *Eaton* and its prospective nature in finding the mortgagor's interpretation of that case as requiring the note and mortgage to be held and transferred together to be without merit. The court wasted little print in rejecting the mortgagor's attempts at questioning the postponement of the sale and the credit bid entered by the bank.

The court finished up by addressing and rejecting the mortgagors' arguments that defects in the "right to cure" notice and default notices render the sale invalid, citing *Schumacher* and *Pinti*.

A member of the REBA Board of Directors, Julie Moran is president of the Waltham-based law firm Orlans Moran. She can be contacted by email at jmoran@orlansmoran.com.

HUD issues guidance on criminal history screening procedures

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ant safety or property. As perhaps their most fundamental obligation is to keep residents safe and secure, the landlords' concern is certainly legitimate. The guidance recognizes this fact, but states that landlords must be able to prove that their criminal screening policies actually do protect tenant safety or property. It then rejects the approach of denying all applicants who have been arrested or convicted as not being an effective means of achieving that goal.

The guidance states that arrest records are not proof of past criminal conduct, since they just show the individual was suspected of committing a crime. An individual with an arrest record does not necessarily constitute a risk to other residents, so excluding that person does not really protect residents and does not satisfy the landlord's burden of demonstrating that the policy "is necessary to achieve a substantial, legitimate, nondiscriminatory interest." The guidance quotes the U.S. Supreme Court in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957), where the court stated that "the mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense."

Individuals who have been convicted have committed crimes. However, the guidance notes that there are many different types of crimes of which one may be convicted, some much more serious than others. Similarly, some crimes are more recent than others. It states that a landlord who has a blanket prohibition on accepting any applicant with any type of conviction cannot meet the same burden, that the policy "is necessary to achieve a substantial, legitimate, nondiscriminatory interest." The guidance goes on to say that landlords should tailor their criminal history policy so it distinguishes between which criminal conduct poses a risk to resident safety or property and which does not, and consider the "nature, severity and recency of the criminal conduct."

It recommends that landlords perform an individualized assessment of a conviction and relevant mitigating circumstances, which could include the facts surrounding the criminal conduct, the age of the applicant at the time, the applicant's tenant history before and after the conduct, and evidence of rehabilitation efforts.

Since the Fair Housing Act has specific exemptions for the illegal manufacture or distribution of controlled substances, the guidance points out that it is acceptable for a landlord to maintain a blanket rejection policy for convictions for those specific crimes. These exemptions do not apply to arrests for drug manufacture or distribution, or to convictions for drug possession. Aside from these specific exemptions, the guidance states that denying applicants based upon "a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act."

Arrests should be eliminated as a basis for denying applicants, and landlords should carefully examine the various types of convictions for their relation to threats to safety or property.

Landlords should now be reviewing and revising their qualifying criteria. Arrests should be eliminated as a basis for denying applicants, and landlords should carefully examine the various types of convictions for their relation to threats to safety or property. Landlords who use firms to search criminal histories and recommend acceptance or rejection of applicants should revise the specific criminal decision criteria used by the firms. An applicant who is rejected solely for criminal history should be given an opportunity to provide evidence of mitigating circumstances for the landlord to consider.

Implementing these new policies will take some time but should not be overly burdensome to landlords. Without a doubt, taking steps now to comply with the Fair Housing Act can help avoid potential disparate impact claims in the future.

Ken Krems is a partner in the Boston law firm of Shaevel & Krems, where he focuses on residential and commercial real estate management and other real estate issues. Ken co-chairs REBA's Residential Landlord/Tenant Committee and he can be reached at kkrems@shaevelkrems.com.

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Affordable housing: pump up the volume cap

BY ROBERT M. RUZZO

Summer is almost upon us. Time to think warm thoughts about persistently low interest rates, increasing housing production (particularly within the city limits) and both progress on Mayor Walsh's housing initiative and a new effort by Gov. Charlie Baker to ensure that the middle class is not permanently shut out of all this new production. Nice!

Just when you thought it was safe to go back in the water … our acute housing crisis in Massachusetts unveils an entirely new twist.

Preservationpalooza

The crest of a long-approaching wave of transactions seeking to preserve affordable housing is nigh. While mortgages on federally subsidized projects continue to mature, the approximately 40 developments in the so-called "Section 13A portfolio" are about to start maturing as well, beginning in calendar year 2017.

Section 13A represented a state-backed initiative designed to mimic the Federal Section 236 program (with an appropriate amount of home grown nuance and complication) by subsidizing mortgage rates down to an effective interest rate of 1 percent. That home-grown nuance has helped make these 4,307 units home to an extremely vulnerable tenant population.

And don't look to the federal government for help in sorting this out. Unlike the Section 8 and Section 236 portfolios, which have federal resources such as vouchers available to protect the tenant population, the Section 13A portfolio will not be on the receiving end of any similar federal resources.

This is new territory for the preservation of affordable housing in Massachusetts, the kind of challenge we really did not need.

Some good news: Folks have been planning for this day in the affordable housing world, in the Legislature and in the administration, as well as at MassHousing, which has been meeting with the owner community; it intends to make a credible preservation offer to the owners of every Section 13A development in the near future, and has made it clear that protecting existing residents is job one.

In a world of limited resources, however, this focus on the Section 13A portfolio is bound to have important ripple effects on other preservation transactions. Simultaneously, "private activity volume cap" authority needed to issue tax-exempt housing bonds and thereby secure the associated "automatic" 4-percent affordable housing tax credits is in

increasingly short supply. (Full disclosure: your correspondent has represented entities seeking these bonds and credits). And by the way, that same volume cap which is so essential to affordable housing preservation is also a catalyst for new affordable housing production.

The way we were

Space constraints and the Geneva Convention prohibit a long discourse on the mechanics of how private activity multi-family housing bonds and their associated tax credits make affordable housing both financially feasible and the rehabilitation of tired affordable assets practicable.

For purposes of our immediate situation, let's just focus some facts about private activity volume cap bonds in Massachusetts. In calendar year 2016, our commonwealth has a bit less than $700 million in volume cap authority at its disposal ($679,440,000, to be exact). Historically, this authority has been largely allocated among MassHousing (for multi-family and single-family housing purposes), MassDevelopment (economic development and housing) and the Massachusetts Education Finance Authority ("MEFA") (student loans).

Not a bad cast of causes with which to be associated.

For many years, including the first two thirds of the 2000s, scarce volume cap was a way of life. During these years,

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Update on MCLE's Henry H. Thayer Scholarship contributions

The individuals and organizations listed below have contributed to MCLE's Henry H. Thayer Scholarship Fund.

Henry served as president of the Massachusetts Conveyancers Association (REBA's predecessor) in 1988 and received the group's highest honor, the Richard B. Johnson Award, in 1995. He is also a past president of The Abstract Club and served for many years as chair of the joint amicus committee of both groups.

For more information about the scholarship or to make a contribution, contact REBA Executive Director Peter Wittenborg at wittenborg@reba.net or Sal Ricciardone at MCLE at sricciardone@mcle.org.

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Affordable housing: pump up the volume cap

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several techniques (including blending taxable and tax-exempt bonds and recycling volume cap from short-term construction loans) were utilized to stretch the multi-family housing portion of the volume cap resource as far as possible.

Then came the Great Recession. Profits withered, the GSEs collapsed, and the tax credit market followed. The homeownership sector experienced the greatest real estate collapse since Atlantis, and in 2009, MassHousing's rental lending volume was little more than half of what it had been the previous year. Access to the bond market in general was far more challenging.

As a result, private activity volume cap allocations built up. Federal tax rules allow volume cap to be rolled over for a three-year period. Not that long ago, Massachusetts had nearly twice (approximately $1.3 billion) its annual allocation of volume cap available due to this ability to carry over cap from year to year.

Times have changed. Nationwide, according to The Bond Buyer, in calendar year 2015 $16.7 billion in tax-exempt housing bonds were issued, a 27-percent increase over calendar year 2014. In Massachusetts, the multi-family market has been even more active, and the "carryover surplus" of private activity bonds has been fully utilized. Now, as we enter into the peak years of the Section 13A portfolio challenge, demand for this essential preservation tool is likely to far outstrip supply.

> For many years, including the first two thirds of the 2000s, scarce volume cap was a way of life.

Not all bonds are created equal

While private activity bonds can be utilized for a number of worthwhile purposes, multifamily housing bonds, by virtue of the 4-percent affordable housing tax credit, represent the most cost efficient use of this valuable resource. This tax credit is unique to multifamily housing bonds and simply does not exist in the single family, economic development and student loan bond financing worlds.

While there may be an understandable reluctance to upset the balance of an historical volume cap-sharing arrangement among (or within) MassHousing, MassDevelopment and MEFA in order to allocate more volume cap to multifamily housing purposes, the ever-increasing housing demands on volume cap may force our collective hand.

Given these circumstances, a few considerations for both public and private actors are worth keeping in mind, including the following:

• Transparency is key. As allocating what has until recently been a freely available resource becomes more like a competitive process, a clear articulation of the characteristics that will make a transaction eligible for volume cap is needed. Getting the message out while taxable interest rates are still low will help some transaction players realistically analyze their options and reset expectations.

• Consistency is like transparency. Hopefully, the lessons of the early 2000s have been learned and determinations about the eligibility of a transaction for volume cap will be uniform across both quasi-public housing lenders. DHCD's role as a referee in this discussion could potentially increase.

• A little (transparent) math would help. Make public an analysis of what the realistic cost would be to "shift" volume cap from other uses toward multifamily housing in order to use the resource in its most efficient manner. An adult conversation about options for making the potential "donors" of this volume cap financially whole might actually ensue (a financing fee? Future Legislative appropriation? Private Foundations via donations to the Affordable Housing Trust Fund? Some combination of the foregoing?).

• Be prepared to be challenged. Potential Buyers, Sellers, and their counsel can expect greater push back than ever from public lenders. The case for volume cap being a necessary, rather than a desirable, element of a transaction will need to be made, and for the transactions that withstand this analysis, an even greater duration for affordability restrictions on future rents can be anticipated.

Panic never helps, particularly in a sustained crisis, but in the years ahead, the premium on being proactive in the pursuit of volume cap will only increase.

Enjoy your summer swims. Ignore the dorsal fins at your own risk.

A frequent contributor to REBA News, Bob Ruzzo is a senior counsel in Holland & Knight's Boston office. He possesses a wealth of public, quasi-public and private sector experience in affordable housing, transportation, real estate, transit-oriented development, public private partnerships, land use planning and environmental impact analysis. Bob can be contacted by email at Robert.ruzzo@hklaw.com.

Landlord/tenant committee launched

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Ward has a broad-based transactional and litigation practice with a concentration in residential landlord/tenant matters. He has taught law at Suffolk University Law School and Boston University Paralegal School. He has been a guest commentator on several television programs and has given interviews regarding rent control and landlord/tenant rights. He has also been a consultant to the Massachusetts Association of Realtors.

Ward has also authored two books on landlord-tenant law. He published a treatise/practice manual, "Massachusetts Landlord-Tenant Practice: Law and Forms," in 1996, and "Massachusetts Landlord-Tenant Practice: Law and Forms – Security Deposits and Last Month's Rent," currently available on Amazon.com.

Ward also serves on the panel of mediators for REBA Dispute Resolution, an association affiliate.

Kenneth Krems represents large residential management companies and has responsibility for more than 1,100 housing units in Massachusetts. He also represents landlords and tenants on commercial leasing issues, as well as condominium associations. He serves as a director of the Greater Boston Real Estate Board's (GRREB) Rental Housing Association and is a chapter co-author of MCLE's treatise, Residential and Commercial Landlord/Tenant Practice in Massachusetts. Krems has taught various CLE courses for MCLE, the MBA and the New England Affordable Housing Management Association.

The committee expects to host its first open meeting in September.

To join the REBA Residential Landlord/Tenant Committee, email admin@reba.net.

Protective safeguard endorsements

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savings are worth the endorsement, the owner should at least do the following:

• Do not turn off any protective systems for any period of time without notifying your insurance company and agreeing to whatever requirements it imposes during the shutoff.

• Be sure that your protective safeguards are fully maintained and operational at all times.

• Be certain that your lease form prohibits a tenant from undertaking any alterations without your approval, particularly if those alterations may affect any protective safeguard.

• If you have allowed a tenant to carry property insurance on your property (as is often the case in net leases with a single-tenant building), be sure that the insurance policy does not contain a protective safeguard endorsement, because the risk of losing insurance coverage should be unacceptable to you as an owner.

The question is whether you as a commercial property owner should allow a protective safeguards endorsement to be added to your property insurance. While it may save some premium costs, you must weigh that savings against the risk of losing all insurance coverage because of the perilous language lurking within the endorsement.

A former president of REBA, Ed Bloom is a partner in Sherin & Lodgen's real estate department. He was recently honored with the association's Richard B. Johnson Award, a lifetime achievement award. News of the award appears elsewhere in this issue of REBA News. Ed can be contacted at embloom@sherin.com. This article originally appeared in Banker & Tradesman, a publication of The Warren Group.

SJC: no public policy favoring easements by necessity

BY KATHERINE C. BAILEY

In April, the Supreme Judicial Court decided *Kitras v. Town of Aquinnah*, 474 Mass. 132 (2016), finally settling a decade-plus long fight over access rights to lots in a remote part of Martha's Vineyard.

The plaintiffs, desiring to develop property but lacking access to a public way, claimed easements by necessity over neighboring parcels, which they claimed arose out of an 1878 partition of approximately 2,000 acres of Wampanoag land in Gay Head (now the Town of Aquinnah).

The court's decision turned on the specific facts of the case, adopting no new legal pronouncements. But the court affirmed that no public policy favors recognition of easements by necessity whenever a landlocked parcel is created, confirming that claimants bear the burden of showing that easement rights were intended.

As the court noted, necessity must be determined based on the facts in existence at the time of the conveyance. Given that the conveyance at issue occurred well over 100 years ago, those facts and the unique history of the parcels are extensively discussed by the court. At the time of the partition, the lands in question were inhabited by members of the Wampanoag Tribe. The tribe held the land, some in common and some in severalty, under "Indian Title," which gave native people the right of occupancy. Fee title remained with the commonwealth. In 1870, the Legislature, shortly after granting the Wampanoag full citizenship, authorized the incorporation of the Town of Gay Head and also established a process for the tribe members to partition the common land into private ownership. Members of the tribe initiated that process and, by 1878, the appointed commissioners completed the partition of the common lands into over 500 lots.

Many of the new lots were landlocked, a fact that was obvious to anyone looking at the partition plat, but not one deed included a right of access over other properties to a public way. The commissioners did reserve some rights of access over three lots to allow access to a creek for fishing purposes and rights for removal of peat. The court also noted that Wampanoag custom permitted any tribe member to freely cross tribal lands, even those held in severalty. The Wampanoag and their successors-in-interest used these lands, apparently without concern over access rights, for the next 100-plus years.

With that background, the court declined the parties' and amici's invitations to make new pronouncements of law. Instead, the court's decision turned on the fact specific nature of the partition and need for access rights, as they existed in 1878.

The court stated that there is no public policy favoring easements by necessity in Massachusetts; that is, an easement by necessity does not automatically arise any time that a parcel of land becomes landlocked. Instead, such rights only arise if the parties intended rights to be conveyed, despite silence on the matter in the title records. The claimant has the burden of proving the intent of the parties, but the common law affords claimants a presumption to "assist the inquiry." If the claimant can demonstrate that the dominant and servient properties were held in unity of title and the severance of that unity created a necessity, the presumption is raised.

The court found that the plaintiffs raised the presumption but that the defendants successfully rebutted it by producing contrary evidence, including the custom of free access over tribal lands, the large-scale nature of the partition in which the grantor did not retain title to the lands over which the easements were claimed, the tribe members' input into the partition process, the express creation of rights in some deeds, similar partitions of other tribal lands in which the commissioners' contemporaries expressly created access rights, and the relatively poor condition of the land at the time of the partition. In the absence of other evidence, the court held that the plaintiffs did not meet their burden and no easement rights were intended.

The court's decision rests on the particular facts of the case and does not make sweeping new rules; however, the court's statement that there is no public policy in favor of easements by necessity in Massachusetts is an important point to confirm.

The parties and amici argued over whether the Court should adopt or rely on the Restatement (Third) of Property (Servitudes) §2.15 (2000), which states that a servitude necessary for the reasonable enjoyment of land will be implied "unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights." Comment a to Section 2.15 explains that courts have justified this rule both on public policy grounds (that productive use of land is favored) and on private contract grounds (that there is a presumed intent of the parties).

Despite reserving the question of adopting Section 2.15 for another case, the court appears to reject at least a portion of the rule's justification. By also confirming that the burden is on the claimant to prove an intent to include such rights, rather than on the defendant to prove an intent to deprive those rights, and that "intent" must be analyzed based on the facts at the time of the conveyance, the court signaled a continued strict analysis of easement by necessity claims.

If the plaintiffs' claim of an easement by necessity, arising out of a 100-plus year old conveyance where no necessity existed at the time of conveyance, had been successful, it would have set potentially problematic precedent. Implying easements by necessity based on a necessity emerging long after a conveyance would cause there to be little certainty in title to any property. The court's analysis confirms that easements by necessity do not arise simply because of a past or newly found necessity and that the court will continue to analyze these claims under a private contract theory, requiring a claimant to prove the intentional creation of access rights.

Katherine "Kacey" Bailey is an associate in the real estate and development practice group of the Boston office of Robinson & Cole. She can be contacted by email at kbailey@rc.com.

Edward M. Bloom (right) with his wife, Ellen Harder

Clockwise from far left: retired Appeals Court Judge R. Marc Kantrowitz; Land Court Chief Justice Judith C. Cutler; Appeals Court Judge Mark V. Green; and Ellen Harder, wife of Johnson Award recipient Edward M. Bloom

Loretta G. King, legal secretary at Boston law firm Sherin & Lodgen

Former REBA President Bloom honored with Johnson Award

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update on real estate law at the Massachusetts Bar Association's annual meeting from 1980 to 2002 and was designated a Scholar-Mentor by MCLE in 2012.

Widely respected for his knowledge and experience in real estate law, Ed is the general editor of "Lease Drafting in Massachusetts," an MCLE publication. He also is a contributing author of a chapter on construction mortgages to MCLE's "Crocker's Notes on Common Forms." In 2006, Ed was inducted into the elite American College of Real Estate Lawyers.

Ed received his BS in 1962 from Tufts University and his LL.B. in 1965 from Boston College Law School, where he was an editor of the Law Review. He served as chief judicial law clerk to the Superior Court justices under Chief Justice G. Joseph Tauro and clerked for Judge Cornelius J. Moynihan when he presided over the Albert DeSalvo ("Boston Strangler") trial.

Although raised a Yankee fan, Ed is now a zealous Red Sox fan with a voluminous knowledge of the team's history and trivia. He and his wife, Ellen, live in Wayland.

Robert Carney, chair of Sherin & Lodgen's real estate department, introduced Bloom at the encomium luncheon, which was attended by many of Bloom's partners and colleagues, including Loretta King, his longtime secretary.

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