REBA news
WWW.REBA.NET
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REBA launches new website

BY BOB GAUDETTE

REBA is pleased to announce the launch of its new and updated website. For the past several months, we have worked with Intus Technologies to design and build a site we believe will provide a cleaner, faster, user-friendly platform for our members' needs. Best of all, if you've had the old site address bookmarked, you don't need to change anything – the address remains the same, www.reba.net.

Here are a few highlights of the new site, which we hope you'll take the time to visit and explore:

• Not yet a REBA member? You can join online (click the big "Join" bar right on the front page), or if you'd prefer to use snail mail, you can print out a membership form. If you are already a member, you can renew online too. Just go to "Membership" and click on the "Join/Renew" link.

• The REBA Handbook of Standards and Forms is easily accessible to members from the home page. Two clicks allow you to connect to the title standards, practice standards and ethical standards, as well as REBA's extensive forms library. The link provides PDF and Word versions of our latest approved standards and forms, including those approved at our most recent conference in November.

• The "Member Section" link includes a searchable Membership Directory, making it easier for you to reach out to fellow REBA members. It also includes a page for news about REBA's legislative initiatives, amicus filings and UPL updates. You can also access the CFPB resource page, which pulls together a number of resources from both REBA and ALTA.

• The "About Us" link allows you to sign up for a committee or section and to view the current membership and leaders of the section you're interested in.

• Looking for CLE videos? The home page has a direct feed to the REBA blog where all REBA news articles can be accessed, as well as web-only content including MP3 recordings and videos.

• The home page is designed to keep you abreast of current news and activities at REBA, featuring our Twitter and Facebook feeds, REBA's blog and a calendar of upcoming REBA events. You can subscribe to our Twitter, Facebook and LinkedIn pages as well, making it even easier for you to keep up-to-date on the latest developments in real estate law.

We hope that when you've had a chance to visit www.reba.net, you'll come back regularly. Don't hesitate to tell us what you think of the site once you've had a chance to use it. The state of the law is ever-changing, and we're changing too – for the better!

Bob Gaudette is the association's information technology officer. He welcomes comments and suggestions about the new website and any other technology-related issues. You can contact him at Gaudette@reba.net.

CAN WE TALK SOLAR?

The REBA residential conveyancing section held an open meeting in early December hosted by Norfolk County Register of Deeds William P. O'Donnell. The program included a discussion of the legal and title issues involved with solar panels on single family dwellings. From left: O'Donnell, section co-chair Michelle T. Simons, section member Conrad J. Bletzer, REBA President Susan B. LaRose, President-elect Francis J. Nolan and First American Title's Jutta R. Deeney

The verdict is in: New Land Court Rule 14 approved and in effect

BY GILES L. KRILL

Last October, the Rules Committee of the Supreme Judicial Court approved "Proposed Land Court Rule 14: Binding Summary Decision Following Bench Trial: Waiver by Parties of Special Findings of Fact and Separate Rules of Law."

The Land Court Department of the Trial Court promulgated Rule 14 as one of multiple initiatives carried out in accordance with SJC Chief Justice Ralph D. Gants' request that each Trial Court Department convene a working group of judges, court staff and attorneys to develop a "menu of options in civil cases that will ensure litigants the opportunity to have a cost-effective means to resolve their dispute in a court of law."

Rule 14 provides litigants and their counsel with the option to proceed to a bench trial under a stipulation waiving the requirement in Mass. R. Civ. P. 52(a) that the court "shall find the facts specially and state separately its conclusions of law thereon."

See RULE 14, page 11

REBA partners with WFG National Title

REBA has partnered with WFG National Title Insurance Company in its effort to support the role of the lawyer at the closing table and to combat the unauthorized practice of law.

"This new partnership is part of the evolution of Massachusetts Attorneys Title Group which I founded in 2007," said MassATG's Thomas Bussone. "Of course, I will continue to work on behalf of REBA members to support and build this partnership."

"We are thrilled to partner with REBA in their continuing efforts to support its lawyer members in these challenging times. We are committed to serve REBA and its members," said Mike Supple, WFG's vice president and New England sales manager. "Tom Bussone will remain a strong asset for us as we continue to expand WFG's market share both in Massachusetts and throughout New England."

Under the terms of this new, direct relationship, WFG will make monthly donations to REBA to help support its efforts, the amount which will continue to increase as WFG grows in Massachusetts.

REBA will provide WFG and its independent title agents with strong defense and support of the important role attorneys provide in the closing process.

"WFG agents in Massachusetts can take pride in knowing that their affiliation with WFG is directly supporting the fine efforts of REBA and its members, and in benefiting the Massachusetts conveyancing community as a whole," said Supple.

To learn more about the WFG / REBA partnership, please contact Tom Bussone at matg2124@maine.rr.com.

At the REBA annual meeting and conference, President-elect Fran Nolan offers remarks at the conclusion of the meeting's plenary session, sharing his plans for 2017.

Using technology to make REBA more accessible

BY FRANCIS NOLAN

President's Message

Technology can be a wonderful thing. The other day, I "installed" a new DVD player for the TV in my house.

Run a cable from the little box to the side of the television? Done. Plug the little box in? Check. That's all it took.

The DVD player came complete with pre-loaded apps, including one for Netflix and another for Amazon Prime. The remote control even had a button labeled "Netflix." All in all, the toughest part of the process was remembering the passwords for our accounts with Amazon and Netflix.

Twenty minutes from start to finish and I had restored my family's grand video buffet, for which I am sure they would have thanked me if they had not already retreated into their respective viewing cocoons.

The concept that one can plug and play – get one's information however and wherever it's most convenient for the consumer – has been an ongoing topic of conversation at REBA headquarters for more than a year thanks in large part to Susan LaRose, who is finishing an extremely successful term as president as I write this message.

Susan has consistently pressed the notion that being an active participant in REBA shouldn't require a person to travel into Boston's Financial District. Why shouldn't every REBA member be able to access relevant information from the comfort of their home or office? Shouldn't the benefits of REBA membership be available 24/7?

Of course Susan's right. Whether you practice in Allston, Ashland, Amherst, or Alford, you should be able to be part of the ongoing conversation that makes REBA such a valuable experience.

Under Susan's leadership this year, REBA began offering real-time webcasts of its open committee meetings. We immediately saw a response from our members; some programs that would normally draw 10-15 people to REBA's Boston headquarters now also attracted over 50 attendees online.

It's clear that there is an appetite for the type of programming that REBA presents for its members all the time; now, we need to focus on making these presentations available not just wherever, but whenever our members want it.

And that brings us to 2017. We come into the new year having rolled out a new REBA website (same address, www.reba.net), which we hope you will visit frequently. We're going to make our webcasts available online so you can watch them at your convenience. If you're a member of the bar in a jurisdiction that requires CLE, well, we're working on that too. And you'll be able to find a lot more in addition to the webcasts. Please stop by the website and check it out, and feel free to let me know if there are things you think we can do to make the site more beneficial for you as a REBA member.

Keep in mind, we're trying to make REBA more, not less, accessible. I mentioned above that being a part of REBA is being a part of an ongoing conversation. Hopefully you'll gain a lot from watching and listening, but what you have to say is important as well. Please consider making yours an active membership, whether you attend section meetings regularly, or you make it out to an occasional REBA event or a conference, or even if you can only participate on line, your voice and the knowledge you choose to share make that ongoing conversation better for everyone.

My hope is to continue the excellent work begun by Susan Larose, for whose efforts everyone in REBA should be grateful, and to make it easier for everyone to hear and be heard. Thanks in advance for being part of the discussion. (And if you haven't joined yet…what are you waiting for? Just go to the website!)

OK Google, save this article. E-mail to REBA. Close file.

Remembering Haig Der Manuelian

BY PHILIP J. NOTOPOULOS

Haig Der Manuelian (1926-2016) passed away in December. He had retired from Holland & Knight in May of last year, on his 90th birthday, after practicing law for 69 years.

Many of us in the real estate bar had known Haig as a brilliant and dedicated lawyer, legal scholar, zealous advocate for his clients' interests and possessor of a great wit and sense of humor.

Haig was in a rush to become a lawyer. He graduated Tufts University at the age of 18, Harvard Law School at 21, and passed the bar six months before he graduated from law school. For many years he was a solo practitioner and also became a partner of Leonard Schlesinger in their office at 18 Tremont St.

In his early years, Haig handled many aspects of the law, ranging from real estate and trusts and estates to tax law and trial practice. In 1980, he joined the former Widett, Slater & Goldman firm as a partner and practiced there until 1993, when he joined Sherburne, Powers & Needham, which in 1998 became part of Holland & Knight.

Although many REBA members may have known Haig as a real estate lawyer through negotiating with him on title matters, property acquisition and retail leasing, he was also heavily involved in tax, trusts and estates matters. For those on the other side of a transaction with him, he was a strong advocate for his clients and demanded precision in drafting difficult clauses, all the while remaining a true professional.

During his entire career Haig was dedicated to pro bono work and legal education. He led many CLE programs and devoted substantial time to representing indigent immigrants free-of-charge, especially in the Asian communities. His Armenian heritage was a source of pride to him, and he spent countless hours on Armenian affairs. Haig visited Armenia 36 times.

He was a founder and chairman of the Armenian Museum of America. Located in Watertown Square, this is the largest Armenian Museum outside of the country of Armenia. Haig, along with others in the Armenian community, founded this museum in 1971. It had a humble start in a church basement and now occupies much of a modern building in Watertown. Haig was a major benefactor and contributor of art and artifacts to the museum, and spent countless hours on museum business.

Haig was also a tireless advocate for

See MANUELIAN, page 10

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's Title Standards, Practice Standards, Ethical Standards and Forms with the understanding that advice to Association members is not, of course, a legal option.

Postmaster: Send address changes to REBA, 295 Devonshire Street, 6th Floor, Boston MA, 02110

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Doing more to get the lead out of Massachusetts homes

BY MARY OLBERDING

Massachusetts has one of the strictest environmental and consumer lead laws in the country and yet, because lead is a heavy metal and is not biodegradable, it continues to cycle through our environment and live in our homes.

Homebuyers get a general overview of lead as an environmental hazard when given the Property Transfer Notification form and the 10-page DPH CLPPPP Property Transfer Lead Paint Notification required by our Lead Law. Despite this effort to educate prospective homebuyers, there is little public awareness of the long term damage of lead poisoning to children and society at large.

Incentives for lead abatement help property owners take critical steps to limit exposure, increase property values and preserve communities. Existing programs like Lead Safe Boston offer forgivable loans up to $8500 per unit for eligible property owners. The statewide Get the Lead Out program offers 0 percent loans deferred until the sale, transfer or refinancing of the property.

Incentives for lead abatement help property owners take critical steps to limit exposure, increase property values and preserve communities.

And, the state also offers a tax credit of up to $1500 for those who de-lead.

Since prevention curtails the risks associated with lead, other tax incentives could be implemented or increased to induce lead abatement without putting an undue burden on real estate professionals. They include:

• A tax break for homeowners when they get a certified lead inspection to evaluate their home;

• Doubling the amount of tax credit offered by the state to $3000 to those who properly de-lead;

• Increasing the number of licensed inspectors and contractors who get proper EPA certification with a refundable fee, tax deduction or the like;

•. Incentivizing homeowners to take certification courses to do lead remediation themselves

Why is lead so bad? Lead is a known neurotoxin. We now know that there is no safe level of lead in the blood.

There has been much recent public attention on children's exposure to lead in drinking water, but in the commonwealth, exposure to lead through old chipping paint and paint dust is the biggest cause of lead poisoning. Studies over the years have increasingly shown lead to be far more damaging than when it was federally banned from house paint in 1978, especially for children. Not surprisingly, at 70-80 percent, Massachusetts has one of the highest inventories of pre-1978 housing stock in the country.

According to Department of Public Health, it is easy enough for young children to ingest lead dust because it covers surfaces and objects that they touch and clings to their hands and toys, both of which they put in their mouth.

Poorly maintained properties are a risk, but home renovation and repair can also cause exposure without taking proper precautions when, for example, sanding floors or scraping old house paint. About one-third of lead poisoning cases identified in Massachusetts are the result of home renovations by industrious do-it-yourselfers not familiar with proper procedures or laws required for professional renovators.

In 1970, the Centers for Disease Control & Prevention set unsafe blood exposure levels at greater than 40 micrograms per deciliter. They have recently updated their recommendations about the dangers of lead poisoning to reflect new understanding of its deleterious effects. The CDC now says a lead reference level of 5 or more micrograms per deciliter is considered "elevated" and 10 indicates a "level of concern." Dr. Jennifer Lowry, medical toxicologist from Children's Mercy Hospital in Kansas City, Missouri, said on NPR in June 2016, "if a child's blood lead level is more than 5…that child is in the 2.5 percent of children in the country with the highest levels of lead in the blood… at that point the harm has already been done."

When absorbed by the body, lead is known to affect parts of the brain responsible for judgment, impulse control and emotional regulation and decision-making. Prolonged exposure results in brain damage, attention deficits and increased levels of aggression, lower IQs and anti-social behaviors. Studies conducted by an Amherst College professor of economics, Jessica Wolpaw Reyes, find a strong correlation between high levels of blood lead and lower MCAS scores, teen pregnancy, adverse social and even criminal behavior.

My curiosity for the subject was piqued when I read an article in the Washington Post in April 2015 about Freddie Gray, who died while in police custody in Baltimore. Before he was 2 years old, he was irreversibly brain damaged with a blood lead level nearly four times what the CDC considers lead poisoning today.

The author, Terrence McCoy, wrote, "a child poisoned with lead is seven times more likely to drop out of school and six times more likely to end up in the juvenile justice system." Gray had other issues that affected his life, but I learned that the troubled path he followed after severe childhood lead poisoning was entirely predictable to those who know its dangerous effect on the brain.

While efforts by the Massachusetts Department of Environmental Health have proved successful in reducing blood lead levels overall, changes in policy and practice should also be updated.

Under current law, the state DPH is only required to provide medical intervention for persons with 25 micrograms per deciliter of blood lead or higher. That is twice the level of concern that the CDC now recommends. There have been efforts in the legislature to reduce the state standard of lead poisoning to 10. This would mitigate adverse health effects by allowing more children to get treated sooner.

Lead is a complex societal issue that doesn't go away because the lead itself never goes away. Taking preventative action could diminish health and safety hazards now and prevent long term effects on the well-being of our society and our children.

Mary Olberding was elected register of deeds for Hampshire County in 2012. An active REBA member, she currently serves on the association's legislation section. She is also president of the Massachusetts Registers and Assistant Registers of Deeds Association. Olberding can be contacted by email at Mary.Olberding@sec.state.ma.us.

WGF eighth page

A NIGHT AT WOMEN'S LUNCH PLACE
Fundraiser

Hosted by the REBA WOMEN'S NETWORKING GROUP OF REAL ESTATE PROFESSIONALS

SAVE THE DATE

Thursday, April 27, 2017 5:30 - 7:30 p.m.
Special Guest Ayanna Pressley
Networking, Refreshments, Lite Bites, & Raffle

Association creates opportunities to lead

BY KIMBERLY BIELAN
AND BENJAMIN O. ADEYINKA

REBA's Emerging Leader Award was established in 2016 and spearheaded by Nicholas Shapiro and Kendra Berardi, co-chairs of the New Lawyers Section. As described by Nick and Kendra, the goal of the award is to "honor those new members of REBA, who have been members of the bar for 10 years or less and who have demonstrated a level of involvement, excellence, collegiality, ethics and integrity that exceeds expectations for practitioners at their experience level."

As the first recipients of the Emerging Leader Award, which was presented at REBA's 2016 Annual Meeting and Conference on Nov. 7, we both had an opportunity to express our gratitude for the recognition, thank those who have supported us and pledge to continue to devote time to REBA as we practice.

In reflecting upon the award, we are both honored by the confidence that REBA has in us at this stage of our legal careers. In some ways, it is easier to give an award to someone who has a long list of accomplishments and publications. It is another thing, to present an award not based upon what an individual has already achieved, but instead upon what the individual is capable of achieving. We are both grateful to REBA and its members for recognizing the devotion that we have to the bar association and our potential as we move forward.

In accepting this award, we both recognize that we are in this position because REBA creates opportunities for new and young lawyers to become involved and encourages their participation.

Kim has had the opportunity to launch the association's Strategic Communications Committee, which monitors social media platforms and explores ways to share REBA's message across a variety of media. She has also written articles for REBA News and was a panelist at REBA's 2016 Spring Conference.

Ben has been actively involved in the launch of the Landlord/Tenant Section and in planning the New Lawyers Section's programming. He has been a panelist at REBA conferences in the past and also authored two amicus briefs on behalf of REBA, which was submitted to the Supreme Judicial Court.

While Kim works in private practice and Ben serves as an administrative attorney for the Housing Court, we have both found a platform for our individual experiences and interests at REBA. We have also been encouraged to share these experiences and interests by becoming involved in the organization.

We are both honored by the confidence that REBA has in us at this stage of our legal careers. In some ways, it is easier to give an award to someone who has a long list of accomplishments and publications. It is another thing, to present an award not based upon what an individual has already achieved, but instead upon what the individual is capable of achieving.

As members of the Strategic Communications Committee, we work to increase outreach to new members and inform others of the many ways that they can become involved in REBA. One of the messages that we frequently convey is that there are many platforms and opportunities to become involved in REBA and that REBA is receptive to having new and young lawyers play a large role in the organization.

From submitting articles to REBA News, writing for REBA's blog, or joining a section and participating in seminars, REBA creates an opportunity for new lawyers to not only grow professionally through targeted practice area discussions, but also provides the chance to develop meaningful relationships with other members of the real estate bar. It is these opportunities that we have taken advantage of, which have placed us in the position to be recognized as "Emerging Leaders."

We again express our gratitude to REBA, the nominating committee, the board of directors and all those who have encouraged our participation in the association. We look forward to our continued involvement.

Kim Bielan co-chairs the association's 2017 strategic communications committee. She is an associate in the litigation department of Marcus, Errico, Emmer & Brooks. Her prior legal experience includes an internship for the retired Land Court Judge Harry M. Grossman. In her hometown, Bielan chairs the Falmouth Planning Board. She can be contacted by email at kbielan@meeb.com.

A member of the REBA board of directors, Ben Adeyinka was among a small group of members who planned and nurtured the association's Residential Landlord/Tenant Section. He has also worked closely with the co-chairs of the New Lawyers Section in planning the group's programs and networking events. Adeyinka currently serves as administrative attorney for the Housing Court, where he works closely with Deputy Court Administrator Paul J. Burke and Chief Justice Timothy F. Sullivan. He can be reached by email at adeyinkaesq@gmail.com.

Summary of post-foreclosure case law, Part II

BY BENJAMIN O. ADEYINKA

Editor's Note: This is the second of a two-part article of a comprehensive summary of current post-foreclosure case law in Massachusetts. Part I was published in the November/December issue of REBA News.

Foreclosure law is complex, to say the least. Lawyers, judges, lending institutions and title companies have struggled with this particular area of law here in Massachusetts. Foreclosure law is a somewhat of a hybrid of various areas of law, including contracts, property, torts, bankruptcy and consumer protection, to name a few. Statutes were enacted by the legislature to deal with foreclosure law. Those statutes have been amended and interpreted through case law.

However, this area of the law is not an exact science with a one-size-fits-all solution. As a result, it is important for individuals who practice foreclosure law to familiarize themselves with the statutes and case law. The collection of cases infra is not an exhaustive list, but it provides you with relevant state court cases decided in 2016, which are important to foreclosure law.

Attorney under seal

HSBC Bank, USA, N.A. v. Howe, 2016 Mass. App. Div. LEXIS 4 (Mass. App. Div. 2016)

HSBC initiated a summary process action in Malden District Court to evict the Howes. The Howes filed motions to strike an affidavit of sale executed pursuant to G.L.c. 244, §15, and later for summary judgment for possession, both of which the court allowed, stating that HSBC had not been legally assigned the mortgage, that the affidavit of sale was defective and that the attorney overseeing the foreclosure acted without a written authorization under seal. HSBC appealed and the Appellate Division of the District Court reversed the decision of the Malden District Court.

In reaching that conclusion, Appellate Division of the District Court stated:

1) the assignment from Wells Fargo to HSBC was "'otherwise effective to pass legal title' and cannot be shown to be void". *Id*. at *2 quoting *Bank of N.Y. Mellon Corp. v. Wain*, 85 Mass.App.Ct. 498, 503 (2014), quoting *Culhane v. Aurora Loan Servs. of Neb*., 708 F.3d 282, 291 (1st Cir.2013);

2) "given that the PSA is to be governed by New York law 'without regard to conflicts of laws principles' and applying New York law as New York courts have, the assignment was not void as it relates to the Howes, who, in turn, not being beneficiaries of the trust, were without standing to challenge it." *Id*. at *3. (noting apparent contradictions under New York law, but ultimately concluding that ultra vires trust transactions are voidable rather than void). *Koufos v. U.S. Bank, N.A*, 939 F.Supp.2d 40, 49 n. 5 (D.Mass. March 21, 2013);

3) the affidavit complied with the provisions of G.L.c. 183, §8, and Appendix Form 12, and of G.L.c. 244, §15, and should not have been stricken. *Id*. at *5; and

4) "an authorizing instrument is unnecessary where 'the mortgagee, conducted the foreclosure with the assistance of attorneys who acted on its behalf.'" *Id*. at *5 (internal quotation omitted).

This decision pre-dates *Federal Nat'l Mtge. Ass'n v. Rego*, which was the SJC decision that clarified the attorney under seal issue.

Federal Nat'l Mtge. Ass'n v. Rego, 474 Mass. 329 (2016)

The SJC was presented with two issues in this case:

1) the meaning of the language in G.L.c. 244, §14, authorizing "the attorney duly authorized by a writing under seal" to perform acts required by the statutory power of sale; and,

2) whether, in a post-foreclosure summary process action, the Housing Court may consider defenses and counterclaims seeking relief pursuant to G.L.c. 93A.

On the first issue, the SJC held that: "the expression [attorney duly authorized by writing under seal] is a term of art that refers to a person authorized by a power of attorney to act in the place of the person granting that power". *Id*. at 330.

Here, because no person purported to act under a power of attorney, but only as legal counsel acting on behalf of a client, the statutory language on which the former owners relied to challenge the validity of the foreclosure is inapplicable. "[The SJC] conclude[d] also that legal counsel may perform the acts at issue in this case without written authorization, as the "person acting in the name of such mortgagee." *Id*. at 330; see also G.L.c. 244, §14.

The foreclosure therefore suffers no defect on the asserted ground that mortgagee failed to provide such authorization to its attorneys. On the second issue, the SJC held that: "the Housing Court may consider defenses and counterclaims seeking relief pursuant to G.L.c. 93A, and conclude[d] that the Housing Court has limited authorization to entertain such claims." *Id*. at 331. This ruling is consistent with the SJC's prior rulings in *Bailey* and *Rosa*.

Right to Cure

Fannie Mae v. McArdle, 2016 Mass. App. Unpub. LEXIS 515 (App. Ct. May 10, 2016)

A post-foreclosure summary process complaint filed in the Housing Court by FNMA, sought possession of a condominium in Lynn. The defendant homeowner, McArdle, answered and filed counterclaims contesting the validity of the foreclosure sale and demand for possession.

The Housing Court denied FNMA's motion for summary judgment and allowed McArdle's cross motion for summary judgment, in part and dismissed FNMA's complaint. The judge concluded that FNMA's failure to send McArdle a second right-to-cure notice, before accelerating her loan and foreclosing on her home, rendered the sale void as a matter of law. FNMA appealed, arguing that it strictly complied with the terms of the mortgage prior to foreclosure and that a second notice to cure was not required.

The Appeals Court affirmed the decision of the Housing Court, stating: "[i]t is well established that, in order to conduct a valid foreclosure, a mortgagee is required to comply strictly with the terms of the default notice provisions of paragraph 22 and the right to cure." *Id*. quoting *Id*., 472 Mass. 226, 240 (2015). In failing to send a subsequent default notice, prior to acceleration of the mortgage loan in 2011, FNMA failed to comply strictly with those notice provisions.

Face-to-Face Meeting (FHA)

Jose v. Wells Fargo Bank, N.A., 89 Mass. App. Ct. 772 (2016)

Wells Fargo scheduled a foreclosure sale as a result of Jose, the mortgagor's, default. Jose filed an action in the Superior Court on the date of the foreclosure sale alleging, among other things, that Wells Fargo failed to conduct a "face-to-face" meeting with him, prior to the foreclosure, rendering the foreclosure invalid.

Wells Fargo moved for summary judgment, arguing that it was exempt from complying with the "face-to-face" meeting requirement. The Superior Court judge allowed Wells Fargo motion and the complaint was dismissed. Jose appealed.

Wells Fargo primary argument on appeal is that it's exempt from complying with the "face-to-face" meeting requirement because "the mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office". See 24 C.F.R. §203.604(c) (2015). Wells Fargo also stated that the branches within 200 miles of the subject premises do not handle loss mitigation and the staff is not adequately trained to deal with those issues.

As a result, Wells relied on HUD's FAQs in which HUD attempts to clarify its own regulations. The Appeals Court noted that no appellate guidance in Massachusetts exists that clarifies the question of the regulatory interpretation presented in this case. However, the court pointed to other jurisdictions which reject Wells Fargo's argument.

The Appeals Court concluded that "because Wells Fargo maintains loan origination branches within 200 miles of the property... the exemption created by 24 C.F.R. § 203.604(c) is inapplicable to [this] case."

The judgment dismissing the complaint was reversed in part. The court also pointed out that Wells Fargo could "send trained modification personnel to branches (or other locations) in markets in which it conducts loan origination business" to satisfy the "face-to-face" meeting requirement. *Id*. at 1134.

The Appeals Court declined to express a view on the question of whether a video conference would satisfy the face-to-face meeting requirement. *Matthews v. PHH Mortgage Corp*, 283 Va. 723 at 740-741, 724 S.E.2d 196, 205 (2012).

Trustee's motion to avoid lien

Bank of Am., N.A. v. Casey, 474 Mass. 556 (2016)

The SJC consider two questions in this case, which were certified by the 1st U.S. Circuit Court of Appeals:

(1) Whether an affidavit executed and recorded pursuant to G.L.c. 183, §5B, attesting to the proper acknowledgment of a recorded mortgage containing a Certificate of Acknowledgment that omits the name of the mortgagor, correct what

See FORECLOSURE, page 11

New smoke detector requirements take effect

BY MICHAEL F. MCDONAGH

The Department of Fire Services has made several noteworthy changes to the Massachusetts Fire Code that became effective on Dec. 1. The first change requires that expired or inoperable smoke detectors in dwellings built before 1975 be replaced with smoke detectors that use a 10-year sealed battery. A sealed battery cannot be removed from smoke detector units when there is a false alarm in the home.

This new requirement is aimed at making dwelling houses safer in the event of fire. In fact, the department reports that 55 percent of fire deaths last winter occurred in homes with no working smoke alarms.

Impact on the transaction

Because these changes are only being made in the Fire Code, expect no changes to the current process for inspection prior to transfer. The DFS often reminds sellers and their realtors to schedule an inspection well in advance of the anticipated closing date. This is always a good idea and lawyers should encourage their seller clients to arrange for an inspection as early as possible.

An early inspection will provide the seller with sufficient time to rectify any deficiencies with smoke detectors without necessarily changing the closing date. This can be especially helpful in homes that have not been transferred in many years. Because the statute only requires inspection on transfer, those homes that have not been sold within the past 10 years or more are more likely to require upgrades.

Sellers may not realize it, but they may have expired smoke detectors (manufacturers usually suggest replacement after 10 years) that need to be replaced or smoke detector placement may be out of compliance with current rules. To help dispel a common misconception, a seller should be advised that an inspection certificate does not last indefinitely. Fire departments vary, but a certificate is generally valid for 30 to 60 days.

Regulations and Fire Code become more complex

Through a series of changes to regulations and Fire Code over the past 10 years, the regulations have become more complex. The most recent guidance from the DFS, updated on Dec. 1, is over 12 pages long. Determination of the proper type of smoke detectors and the appropriate location depends on a number of factors including:

- Age of the home;
- Number of habitable levels;
- Whether the property has undergone substantial renovation

Sellers should contact a licensed electrician who is familiar with these requirements and familiar with the fire department in the specific community to ensure the home passes inspection prior to closing.

The DFS often reminds sellers and their realtors to schedule an inspection well in advance of the anticipated closing date. This is always a good idea and lawyers should encourage their seller clients to arrange for an inspection as early as possible.

Although this requirement does not apply to carbon monoxide detectors, it does apply to combination smoke and carbon monoxide units. The thought here is that carbon monoxide detectors produce less false alarms and therefore homeowners or tenants are less likely to remove the battery.

In another change, the department also made an adjustment in the proper technology for smoke detectors. The new requirement calls for the use of photoelectric units throughout the entire home. Previous requirements called for photoelectric units close to kitchens and bathrooms and ionization units in other areas of the homes.

Massachusetts joins several other states in adopting new requirement

Massachusetts now joins other states that have adopted the 10-year sealed battery smoke detector requirement. Some of these states, such as New York, have plans to ban the sale of the traditional smoke detectors by January 2018. For now, the older style smoke detectors with the traditional 9-volt battery are still being sold in the commonwealth. However, once these new regulations fully take hold, demand for the traditional smoke detectors will drop.

While this change may potentially result in confusion, homeowners are still free to use old-style smoke detectors in locations that are not covered under the code, such as inside bedrooms.

For additional information, please visit the DFS website, www.mass.gov/eopss/agencies/dfs.

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Probate records: a critical element of good title

BY EDWARD A. RAINEN

Reviewing the records in Probate Court is an important part of every real estate title examination for either purchase or mortgage financing. The typical post-title examination probate check concerning the current owners provides necessary title information about deaths, divorces, the appointment of guardians or conservators, equity suits, name changes and petitions for partition.

This information does not need to be recorded in the Registry of Deeds in order to affect the title. The probate files are the sole source of this information, without which the title cannot be certified to the owner or lender.

By contrast, probates pre-dating the current owner contain critically important information for today's title examinations.

Certainly, the current owner in the chain of title for a piece of property must be checked in the Probate, Divorce and Equity indices in the Probate Court for the county where the property is located. It is the methodology of some examiners to check each and every owner in the chain, particularly concerning competency and divorce.

There are now computer indices in virtually every Registry of Deeds so the existence of recent probate cases may be determined, but the documents are not available at the registries as described above.

The title examiner's job is to provide the closing attorney with the information that is filed in the Probate Court, and the closing attorney must interpret the information in the documents and make sure that any conveyance includes any necessary Probate Court action. The easy availability of the probate documents is vital to this process.

Transactional lawyers are statutorily mandated to examine title back to a "good deed" at least 50 years old. Significantly, pursuant to G.L.c. 93, §70, the closing attorney must certify title to a residential buyer. Further, even commercial title transactions require proper title underwriting and all title insurance companies require a 50-year examination as, of course, does the Land Court for its registration case title abstracts.

Death is a fact of life and there is nothing unusual about people dying while owning their homes or commercial properties. Most title examinations cannot be performed without access to probate records, either the current transaction or 50 years or more years in the past. Accordingly, the Probate Court's "dead case files" are the real estate conveyancer's "living real estate records," and we need access to them, desperately. Significantly, we need to identify the heirs at law for intestate estates and review the will (and/or compromise) for testate estates.

As we approach the first year of full implementation of the requirements of the Consumer Finance Protection Bureau, the time constraints on producing the documentary elements of a real estate transaction have become more and more constricted. The physical location of Probate Courts and the important probate records therein contained is an obstacle to obtaining these records timely and at a reasonable cost.

Many Probate Courts are no longer immediately accessible from the Registry of Deeds in the same county. None of the probate courts have created digitized documents in PDF format, in the same fashion accomplished by the Registries of Deeds almost 15 years ago. As the difficulty of obtaining probate records increases, the additional time and cost to obtain and review paper probate documents from a distant probate court is a genuine issue for, not only the title examiner, but the lender's attorney, the real estate brokers and, of course, buyer and seller.

If residential seller is intending to use the proceeds of the sale of his/her home to purchase a new home, and that sale is delayed two to three weeks, the delay triggers the "time is of the essence clause" of the Purchase and Sales Agreement for both the sale and acquisition, and may invoke the "liquidated damages" provision as well.

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

The solution to the access to historic documents from closed probate cases is scanned copies available online. To do so offers the obvious benefits to the court of eliminating document retrieval, reducing congestion at the probate counter and lowering records storage fees. The benefit to the profession, the lending and brokerage community and the real estate buying and selling public would be significant, also.

Tenancy, death and the need to probate an estate

If an individual holds title to real property and dies before conveying the property, the individual's estate must be probated to convey the property. If two or more people hold title to real property as tenants in common, and one of them dies, that person's estate must be probated to convey his or her half of interest in the property.

If two or more people hold title to real property as joint tenants, and one of them dies, the title to the property vests in the remaining joint tenant. A proof of death for the deceased owner and, if the date of the death is within 10 years, an estate tax affidavit or estate tax release must be recorded for title to vest in the surviving joint tenant.

The title examiner's job is to provide the closing attorney with the information that is filed in the Probate Court, and the closing attorney must interpret the information in the documents and make sure that any conveyance includes any necessary Probate Court action. The easy availability of the probate documents is vital to this process.

REBA's Title Standard # 71 sets forth acceptable proofs of death, one of which is a probated estate. The estate of a sole surviving joint tenant must be probated to establish ownership of the real estate in the estate.

A title examiner should check each owner in the chain of title, to establish if each owner is still alive, has filed for divorce, changed their name, has been determined to be incompetent or below the age of consent and is therefore the subject of a guardianship or a conservatorship, filed a petition to partition, or filed a suit in equity concerning the subject premises. This check is called a probate, divorce and equity check.

If the individual owner died during the period of ownership, the title examiner will abstract the "probate" file and abstract, or photocopy, the pertinent documents to include in the title examination.

Each probate file is assigned its own distinct probate docket number. Each Probate Court keeps a docket book for all probates, and each item, i.e., petition for probate of the will, bond, inventory, license to sell, that is filed for each probate is listed in the docket book. An abstract of a recent probate may include a copy of the docket book for that specific probate, to verify that all important documents that have been filed in a probate are included in the abstract of the probate. The docket sheet allows the title examiner and the reviewing attorney to confirm that all of the documents which have been filed for a specific file are still in the probate file.

If the deceased owner died with a will, the title examination includes a completed abstract of the probate file, the allowed petition for probate of the will, a complete copy of the will and a complete copy of any license to sell. A copy of the docket sheet for the file should also be included.

If the deceased owner died without a will, the title examination includes a completed abstract of the probate file, the allowed petition for the administration of the estate and a complete copy of any license to sell. A copy of the docket sheet for the file should also be included.

The power to sell

For title purposes, if the will of the decedent grants the personal representative the power of sale, the personal representative may sell the property regardless of any other disposition of the property in the will. *See REBA Title Standard No. 10.*

If there is no power of sale in the will or if there is no will, the personal representative must obtain a License to Sell the property. The terms of the license must be followed exactly.

The same kind of license may be granted to the personal representative to mortgage the property. A sale by a guardian or conservator may only occur based upon a license to sell.

Conveying property under the Massachusetts uniform probate code

The adoption of the Massachusetts Uniform Probate Code on March 31, 2012 and the technical amendments that were signed into law on July 8, 2012 do not change the necessity of probating an estate to convey real estate that is held in an estate.

The importance of a title examination that includes a probate, divorce and equity check and reviewing relevant probate files in Probate Court is the same under the MUPC. The MUPC codifies the process and the procedures for probating estates, makes it clearer and simpler in many cases.

Much of the law relating to conveying real estate from an estate remains the same and review of probate documents in a timely fashion is an absolute necessity. G.L.c. 202 is still in force and effect, so the need for a license to sell from an intestate estate, a will without the power of sale, or a conservator still exists.

It is important for the real estate bar to keep the Probate Courts informed of the need for access to the actual probate files and work with the courts to find a comprehensive method of allowing the title examiner and attorney to review probate documents.

Ed Rainen concentrates on commercial and residential real estate title and conveyancing matters. In addition to preparing title abstracts and reports on subcontract to other lawyers, in his related role as certifying counsel, Rainen is also a policy-writing agent with underwriting authority for eight title insurance companies. He frequently testifies as an expert on title matters. Rainen can be contacted by email at erainen@rainenlaw.com.

Boston's most important real estate deal

BY ROBERT M. RUZZO

The Greater Boston real estate market continues to sizzle. As of this writing, the business pages are filled with tales of new development proposals and the princely sums associated with the trading of existing structures. General Electric's relocation to Boston seems but another confirmation of the healthy state of Boston real estate.

It was not always this way.

One transaction, far more than any others, changed the direction for the city and the entire greater Boston region and in the process, entirely by accident, brought about an innovation that would prove instrumental to the future development of affordable housing.

Sixty years ago, the city's real estate economy was moribund. Downtown Boston was simply not seen as a viable development location. The future was in the suburbs. Our capital city was, in the words of the Boston Globe, "a hopeless backwater, a tumbled-down has-been among cities."

Mayor John B. Hynes, elected in 1949, spent much of his 10 years in office reversing the legacy of mistrust between the still Yankee-dominated business community and the Irish-centric political class. This enmity had grown to legendary proportions under Mayor James Michael Curley. Curley built "a beach finer than Waikiki" for his constituents at L Street, while also famously proposing to sell the Brahmins' beloved Public Gardens.

So quietly persistent was Hynes that his efforts earned him the nickname "Whispering Johnny." He had a lot of fences to mend. In the words of Ephron Caitlin Jr., the then-president of the First National Bank of Boston, "Nobody had ever seen an honest Irishman around here."

The clouds of pessimism lifted on Jan. 31, 1957, when officials from the Prudential Insurance Company, the city of Boston, the commonwealth and the Chamber of Commerce participated in the formal announcement of a real estate transaction that would forever change Boston's Back Bay and beyond.

Prudential had set up on the notion of establishing regional home offices and Boston had, with much diligence on the part of city and the Chamber, been selected as one such location. Mayor Hynes and Turnpike Authority Chairman William Callahan worked with company officials on a concept to transform an underutilized railyard in the Back Bay into a new midtown development site.

Callahan, known to some as "the Maharajah of the macadam" was the commonwealth's master road builder in the asphalt age that was the mid-twentieth century. For him, the Prudential proposal gave his plan to extend the turnpike from its initial terminus at Route 128 all the way through to the South Station area, an indispensable ally.

Callahan sought to turn back the opposition of those who viewed the extension as brutally damaging to the existing urban fabric. This group argued that the turnpike should either terminate at Route 128 or at the juncture of the never-constructed "Inner Belt," a planned circumferential highway through Boston, Cambridge and Somerville.

Callahan married his roadway extension to a development project that featured a high-rise office building, a substantial parking garage, a cluster of shops, a hotel, housing and a major civic auditorium.

In return, he was willing to accept a subordinate position and allow the turnpike to be constructed pursuant to an easement through this area, rather than obtaining the fee interest demanded by the Authority elsewhere along the right of way.

As is still true today, an announcement does not a project make. Then as now, implementation constituted the most difficult phase of any concept, and realizing the dream of the Prudential Center would require many more years of work, particularly on the issue of real estate taxes.

But the enthusiasm at the time was palpable. Gov. Furcolo was ecstatic, proclaiming, "[i]t is the most significant single event of this type that has happened in the city of Boston." Mayor Hynes was equally ebullient, "The city of Boston is about to be reborn," he said. "In ten years, Boston will be an entirely different city." One can quibble about the timing expressed in that statement by the mayor, but not the substance.

Real estate taxes remained a major sticking point, with Prudential demanding concessions which would reflect the positive external impacts represented by the project. High risk posturing would mark some of the disputes over taxes and turnpike bond financing. At one point in early construction, Prudential famously turned off the dewatering system for the project's new foundations, resulting in what became known as Lake Prudential.

Making a long and fascinating story short, after many fits and starts, the urban redevelopment statute (Chapter 121A) was rewritten. Woven into that law, perhaps with the helpful suggestion of the Supreme Judicial Court, was the notion of a "limited dividend corporation," a notion that, while born in the controversial world of urban redevelopment, was soon carried over to the arena of affordable housing.

Including this concept would assist the Massachusetts Housing Finance Agency in navigating constitutional issues in the "test litigation" of its enabling statute decided by the Supreme Judicial Court in June 1969. Chapter 40B, the commonwealth's Affordable Housing Law, was passed a mere two and a half months later in August and it too incorporated the concept of a "limited dividend organization" into its provisions. In working to address the need to make the Prudential project a success, entirely serendipitously, techniques emerged that would have broad application in other areas.

While the Prudential Center is far from Boston's most beloved building and is generally not viewed as an architectural success, the development concept underlying it has proven to be flexible enough over the years to allow it to be redefined with changing times.

On the 60th anniversary of a major turning point in the future of the economy of both the city and the state, it is worth taking a few moments to reflect on all we owe to those who went before us and their contributions, intentional and unintentional, to the current day.

For those inclined to read more, check out "Insuring the City" by Elihu Rubin.

Bob Ruzzo is senior counsel in the Boston office of Holland & Knight. 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. Ruzzo is also a former general counsel of both the Massachusetts Turnpike Authority and the Massachusetts Housing Finance Agency. He also served as chief real estate officer for the turnpike and as deputy director of MassHousing. Ruzzo can be contacted by email at robert.ruzzo@hklaw.com.

My cousin Vinnie is very thankful

BY PAUL F. ALPHEN

My cousin Vinnie, the suburban real estate attorney, joined us for Thanksgiving on the Cape. We had Turducken (a dish consisting of a deboned chicken stuffed into a deboned duck, further stuffed into a deboned turkey) for the first time as an experiment. It was spectacular except for the subliminal memory I had of John Madden describing Turducken on Monday Night Football every Thanksgiving season, year after year. We also had a stuffed "side turkey" to make sure there was plenty of real stuffing for the gang.

After feasting, we retired to the living room to watch football and contemplate the status of things. During half-time, perhaps under the influence of tryptophan, Vinnie got philosophical.

"Paulie, I've got a lot to be thankful for. I've got relatively good health, and relatively good relatives. I've made a modest living doing something entertaining and working with good people. You know, I'm even thankful for professional real estate brokers, the ones that go out of their way to keep the deal moving; they meet the home inspectors at the house, help find contractors to complete the required repairs and make sure the work is done and collect the receipts. My current favorite broker is a guy named Harold out of Plymouth who helped an elderly widow sell her summer house. He was instrumental in working out the price adjustment between the parties after the home inspection, and got quotes from electricians for required repairs."

I agreed with Vinnie that a good broker is worth his/her weight in gold, and added that my friend Leslie is one of those hard working brokers.

Vinnie wasn't done, "I'm also thankful for the conveyancing bar, our brothers and sisters who appreciate that real estate law is more complicated than it looks, and go out of their way to work with everyone involved to close the deal. They are the ones, who when they represent a seller, will take a look at the recent online title record when drafting the P&S and will identify issues in advance and immediately start to cure them. They are the ones who make sure the P&S identifies the correct seller and the correct property description. I'm also thankful for the lenders' attorneys who actually read the title reports and only reach out to seller's counsel when there are real title issues; unlike those few characters that email the first two pages of the title exam to us with a cryptic note saying that all items must be addressed."

I concurred with Vinnie, and told my story about the seller who was represented by her son, the in-house corporate attorney, who refused to show me the deed until I handed him a certified check.

My delightful daughter-in-law passed around a charcuterie board loaded with tasty things, and Vinnie had to pause his monologue to enjoy his meats and cheeses.

But soon he continued, "I'm also thankful for my wonderful office staff. We made them adjust to the new TRID requirements, notwithstanding that nobody knew what the requirements actually were. They cooperated with our need for background checks and credit checks, they helped us secure our files, and they learned about new procedures and disclosure statements. They continue to deal with a variety of lenders, each who appear to have different interpretations of the TRID requirements."

Vinnie took a sip of Kentucky bourbon, paused and smacked his lips. "Wouldn't it be ironic if the new administration did away with the CFPB?" He started laughing at his own joke and found it hard to stop. His laughter was contagious.

A former REBA president, Paul Alphen currently serves on the association's executive committee and co-chairs the long-range planning committee. He is a partner in the Westford firm of Alphen & Santos 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, Alphen enjoys numerous hobbies, including messing around with his power boats and fulfilling his bucket list of visiting every Major League ballpark. He can be contacted at palphen@alphensantos.com.

State launches Workforce Housing Trust Fund

BY TED CARMAN AND ELEANOR WHITE

Offering hope to the economically struggling Gateway Cities, a provision of the Economic Development Bond Bill passed by the House and Senate on July 31 and signed by the governor on Aug. 10, authorizes a Workforce Housing Trust Fund as a $25 million pilot project.

The goal of the new program is to make it economically feasible to build or renovate new market rate housing in the Gateway Cities. Unlike in many suburban and more affluent communities, the mayors and city councils from the Gateway Cities welcome new housing that does not carry income restrictions on residents. NIMBYism (Not In My Backyard) is not a problem in the Gateway Cities for market rate housing.

There are 26 Gateway Cities, which are characterized by having higher than average unemployment rates and lower than average educational attainment than the rest of the commonwealth. The Gateway Cities include, among others, New Bedford, Attleboro, Brockton, Worcester, Lowell, Haverhill, Springfield and Pittsfield. Closer to Boston, these cities are Quincy, Everett, Malden and Lynn.

Most of these communities are characterized by market rents for housing that are not high enough to make the financing of new housing feasible, whether new construction or renovation. In fact, in most of these communities, new market rate housing is not feasible even with the equity that can be provided through the Federal and State Historic Tax Credits, equity that does not need to be repaid to investors.

At the same time, as demonstrated by numerous studies, the commonwealth is suffering from a shortage of housing, a shortage that is projected to get worse over the next few years, with dire consequences for the Massachusetts economy.

The commonwealth is experiencing demographic trends – the retirement of thousands of baby boomers and out-migration of younger workers – that are expected to cause the labor work force in the state to actually shrink by 2020, causing a projected shortage of workers and a reduction in the rate of economic growth from 3 to 1.5 percent between the years 2015 and 2018.

It is hard for the economy to grow if there is not an increasing supply of workers to take new jobs that would otherwise be created, and it is hard to grow the workforce if prospective workers have no place to live. This is going to present major problems to the administration and the legislature as the growth rate of revenues declines along with the economic growth rate.

The workforce can't grow without additional housing units that are at prices the workforce can afford. More housing production is therefore an imperative to address this inherent, structural problem with the economy.

Many of the Gateway Cities have commercial and industrial core areas suffering from neglect and a lack of investment, with many buildings empty or significantly underutilized. New housing, built in significant volume, will not only be welcomed here, but can also have a transformative impact on the communities, leading to spill-over investment and the attraction of new businesses and entrepreneurs.

Further, the built environments of these communities are exceptional, containing many beautiful historic buildings, both commercial and industrial. Sixteen of the 26 gateway communities are connected to downtown Boston by the T or commuter rail. Market rate housing would rent at workforce housing rent levels – exactly as needed by the commonwealth – and in those cities with transit to Boston, would help to relieve the pressure on the housing market in Boston proper.

The Economic Development bill makes changes to the existing Housing Development Incentive Program by increasing the HDIP tax credit from 10 to 25 percent and making new construction eligible for the program. Further, historic buildings are eligible for a 20 percent Federal Historic Tax Credit at no cost to the commonwealth.

In addition, the new WHTF provides funding "support" (not a tax credit) for HDIP-eligible projects up to an amount equal to 200 percent of the maximum tax credit amount (i.e. up to 50 percent of the HDIP-eligible cost base). These changes should make it newly feasible for developers to renovate historic buildings and build new market rate housing in HDIP Districts in Gateway Cities.

In return for WHTF funding – and this is a new, creative provision for Massachusetts housing programs – project developers will agree to share with the commonwealth 25 percent of the annual cash flow (after expenses) and 25 percent of the profits on sale or refinancing of the project until such time as the full amount of support is repaid.

It is hard for the economy to grow if there is not an increasing supply of workers to take new jobs that would otherwise be created, and it is hard to grow the workforce if prospective workers have no place to live. This is going to present major problems to the administration and the legislature as the growth rate of revenues declines along with the economic growth rate.

The legislative approval process contemplated that the funding would be provided through the sale of taxable bonds guaranteed by the commonwealth. This would provide a source of funding that would not impact the annual operating budget of the state.

Pursuant to regulations to be prepared by the secretary of the Executive Office of Housing and Economic Development, the legislature anticipated that the bond proceeds would be placed in the WHTF. One funding mechanism would have the Trust Fund provide funds to a quasi-public entity such as MassHousing or MassDevelopment, which would then in turn make long term (30 to 40 years), interest free, subordinated and non-recourse loans to specific eligible projects in HDIP Districts.

In addition to the profit sharing, the cost-benefit analysis assumes that for every 100 units of new housing that is built, between 30 and 50 permanent new jobs will be created. These are jobs that, without the increase in housing supply, would simply not have been created or filled.

And the new taxes – income taxes and sales taxes – paid by these new employees will result in incremental, increased revenues for the state, available to help pay the debt service on the taxable bonds.

Analysis prepared for and during the legislative deliberations indicates that for every dollar invested by the state, it will receive, over time, $2 in benefits. The profit sharing alone is projected to return the full cost of the initial support. As a result, the WHTF program is expected to be self-funding, with the benefits received from higher taxes from newly-filled jobs being sufficient to pay the debt service on the bonds.

To the extent the program is self-funded, it can be expanded in the future to levels that will provide a significant impact on housing availability in the commonwealth, potentially thousands of units per year, and revitalize our Gateway Cities.

The WHTF has the potential to help alleviate the commonwealth's shortage of workforce housing, revitalize the participating communities, and contribute to the economic growth of Massachusetts.

Ted Carman is the president of Concord Square Planning & Development and Eleanor White is the president of Housing Partners, Inc. Both have been engaged in the conceptualization and development of the ideas that resulted in the Workforce Housing Trust Fund legislation. They can be contacted at Carman@ConcordSqDev.com and ewhite@housingpartnersinc.com.

Remembering Haig Der Manuelian: lawyer, scholar, 'zealous advocate'

MANUELIAN, CONTINUED FROM PAGE 2

official recognition of the Armenian Genocide that started in approximately 1915 and cost the lives of over 1 million Armenians. His parents were immigrants who fled the genocide. Haig spent many hours dealing with the U.S. State Department and the Massachusetts congressional delegation to educate and persuade the United States government to officially recognize those terrible events as genocide.

Given his rush to become a lawyer, one might think that being a lawyer defined Haig; not so. He was a true polymath and had many outside interests. Music was a big part of his life. He never tired of telling how as a young boy he sang in the Trinity Church choir for the grand sum of 85 cents per week. He was an accomplished musician – he played the flute in the Arlington Symphony Orchestra – and lover of classical music, especially opera. Haig enjoyed history, the older the better. One of his favorite tricks was to ask someone if they knew in what year Charlemagne was crowned Holy Roman Emperor, a fact not generally taught in law schools. He was also very knowledgeable in art and literature; he was always reading a book – usually something heavy – although he once professed a weakness for Westerns.

To be his law partner was a true pleasure. Haig was always accessible for a "consult," bringing his broad knowledge of other fields of law and how they might affect a real estate matter. At the end of a conversation about a legal issue, there was usually a discussion of some obscure historical fact and always a friendly battle of wits, which usually ended in a victory for Haig.

Haig also relished his battles on the tennis court. He was an accomplished tennis player, possessor of a wicked lob shot, and he ran hard to get every shot. He was notorious for running into nets separating courts and getting tangled up in the nets; this became known in his tennis club as "pulling a Haig."

It was a source of pride for him that he once ran so hard to chase down an opponent's shot that he crashed into the water cooler between courts, demolishing the cooler and nearly electrocuting himself in the process. Haig continued to play tennis after his retirement and was still playing tennis two months prior to his passing.

Haig leaves his wife Adele, four sons, Matthew, Michael, Mark and Martin, a number of grandchildren and a firm filled with former colleagues who will miss him dearly.

The verdict is in: New Land Court Rule 14 approved and in effect

RULE 14, CONTINUED FROM PAGE 1

If such stipulation is approved by the trial judge, the trial decision need not include "detailed written findings of fact and rulings of law," but will instead be in a written or oral form "comparable to a jury verdict." Such decision must also, at a minimum, "answer special questions on the elements of each claim, at a level of detail comparable to a special jury verdict form pursuant to Mass. R. Civ. P. 49(a)."

In addition, the trial decision may include special or subsidiary findings of fact in a form "comparable to the general verdict form of a jury accompanied by answers to interrogatories in a case submitted to a jury as provided in Mass. R. Civ. P. 49(b)."

Rule 14 is a purely elective rule that not only requires the parties to voluntarily opt in, but also requires that their attorneys put significant thought into the stipulation that they submit for court approval.

In addition to waiving Mass. R. Civ. P. 52(a) findings and rulings, the parties' stipulation must:

- Set forth the form of any questions of fact they request to have answered by the trial judge;
- Indicate whether they waive rights of appeal;
- Waive any argument, both at trial and on appeal, that depends on the existence of detailed written findings of fact; and,
- Acknowledge that the appellate standard of review shall be "that which would apply to a verdict by a jury in a case tried to a jury and to the judgment entered thereon"

In order to obtain court approval of the Rule 14 stipulation, it logically follows that the parties should agree to a substantial number of undisputed facts and frame the trial issues in a manner that is susceptible to a ruling in the nature of a jury verdict, including by proposing the form of the "special questions on the elements of each claim" that must be answered by the trial judge.

While the court retains discretion to render full Mass. R. Civ. P. 52(a) findings of fact and conclusions of law, Rule 14 specifically provides that once the court accepts the parties' stipulation, it shall not make findings or rulings without first giving the parties a chance to object and be heard.

Rule 14 provides Land Court litigants with a means to obtain a speedier resolution of their disputes. Land Court cases often exact a toll on the parties regardless of outcome. After all, the pendency of litigation can frustrate attempts to sell, mortgage, develop or otherwise make profitable use of the land subject to the litigation.

Clients feel this hardship with every passing day that they await a decision and entry of final judgment. However, in certain cases the divisive issue can be reduced to a discrete "yes or no" question, such as:

- Whether a party can carry its burden of proving title by adverse possession;
- Whether a municipal by-law applies to a certain land use activity, or
- Whether a signature on a deed was forged

In such cases, Rule 14 presents an opportunity for parties to obtain the answer they need to move on with their lives at or near the conclusion of the trial evidence in much the same way a jury trial provides more immediate closure.

At the same time, because the Land Court has an individual calendar system, the parties receive the benefit of a particular Land Court judge serving as the trier of fact in a case the judge knows well on its unique facts, in addition to the judge's extensive background in commonly occurring issues of law and fact that can permeate real property controversies.

The final version of Rule 14 differs from the original version submitted for public comment in March 2016. Among other differences, the original proposal simply required the court to "decide only the ultimate issue(s) tried", whereas the final version requires at a minimum, that the decision "answer special questions on the elements of each claim, at a level of detail comparable to a special jury verdict form." This revision ensures that in cases where appellate rights are preserved, the appellate courts will have some insight into the reasoning of the Land Court judge.

While most parties opting for Rule 14 disposition will likely reserve rights of appeal, as a practical matter, Rule 14 makes the most sense in controversies where the parties do not intend to appeal. Appeals from civil jury verdicts are typically confined to issues such as evidentiary rulings and jury instructions, and it is harder to envision a tenable appeal on such grounds after Rule 14 forces the parties to collaborate on a thoughtful stipulation that streamlines the case into a discrete set of questions.

Furthermore, the appellate process will add to the delay that is avoided by opting for a Rule 14 trial decision, and certain categories of Land Court cases that proceed to trial are unlikely to be disturbed on appeal regardless of outcome. For example, the appellate courts will give substantial deference to the fact-finding of the Land Court judge in assessing matters such as witness credibility or land characteristics gleaned from a "view" of the property in question.

In cases where the outcome turns on such factual assessments by the trial judge, the parties are not necessarily making a sacrifice by foregoing the broader spectrum of appellate argument that findings and rulings under Mass. R. Civ. P. 52(a) might afford. In short, in certain classes of cases in which the law is long decided and an appellate reversal is unlikely, Rule 14 provides Land Court litigants with a viable path to quicker case closure.

A member of the association's litigation section, Giles Krill has over 15 years of diverse legal experience, focusing on commercial litigation, real estate, environmental and land use law. He served as a REBA representative on the Land Court's working group that developed Rule 14. His practice includes the representation of individuals and businesses, including developers, insurers and lenders. Krill can be reached at giles@gottliebesq.com.

Comprehensive summary of post-foreclosure case law

FORECLOSURE, CONTINUED FROM PAGE 6

the parties say is a material defect in the Certificate of Acknowledgment of that mortgage?;

(2) Whether an affidavit executed and recorded pursuant to G.L.c. 183, §5B, attesting to the proper acknowledgment of a recorded mortgage containing a Certificate of Acknowledgment that omits the name of the mortgagor, provides constructive notice of the existence of the mortgage to a bona fide purchaser, either independently or in combination with the mortgage?

The SJC answered both questions in the affirmative.

This case began in the bankruptcy court, where the bankruptcy trustee filed an adversary complaint in the bankruptcy, seeking to avoid the mortgage granted by the debtors to the bank on the ground that it contained a material defect, namely, the omission of the mortgagors' names from the acknowledgment.

The bank filed a motion for summary judgment, arguing that any material defect in the mortgage was cured by the closing attorney's §5B affidavit, which was filed and recorded six months before the debtors filed their Chapter 7 bankruptcy petition. The trustee opposed the motion and the Bankruptcy Court granted summary judgment to the trustee, concluding that the material defect in the mortgage was not cured, and could not be cured, by the attorney's affidavit.

The bank appealed to the U. S. District Court reversed and granted summary judgment to the bank, based on the judge's determination that attorney's affidavit did clarify the chain of title and cured the defect in the mortgage created by the absence of the mortgagors' names from the acknowledgment. *Bank of Am., N.A. v. Casey*, 517 B.R. 1 (D. Mass. 2014).

The trustee appealed to the 1st Circuit, which concluded that a proper resolution of the appeal turned on undecided issues of Massachusetts law and accordingly certified to this court the two questions previously set out.

The SJC held that an attorney's affidavit filed pursuant to G.L.c. 183, §5B, attesting to the proper acknowledgment of a recorded mortgage, in certain circumstances cures the defect in the acknowledgment. *Id.* at 561-567. The SJC also held that in a case in which the §5B attorney's affidavit does cure the defect in the acknowledgment, the attorney's affidavit, considered in combination with the originally recorded mortgage, provides constructive notice of the existence of the mortgage to a bona fide purchaser; in a case where the attorney's affidavit does not cure the material defect in the acknowledgment, the affidavit, whether alone or in combination with the mortgage, does not provide constructive notice. *Id.* at 567.

Mortgage Electronic Registration System Inc. (MERS)

Epps v. Bank of Am., N.A., 90 Mass. App. Ct. 1110 (2016)

In April 2012, Epps (the mortgagor) filed an action in Superior Court challenging the validity of a 2010 foreclosure sale of her home. Epps asserted that the bank/mortgagee lacked authority to foreclose and she also alleged violation of the unfair debt collection practices. On summary judgment, the court granted possession to the bank/mortgagee.

Epps filed a motion for reconsideration and a motion for relief of judgment both of which were denied. This appeal was filed. On appeal, Epps' primary argument was that the foreclosure was void because the bank did not hold the note at the time of the foreclosure.

The Appeals Court affirmed the Superior Court stating that "Epps's argument that MERS was not the lawful mortgagee is contradicted plainly by the express language of the mortgage, which states, 'MERS is the mortgagee under this Security Instrument.'" *Id.* at *4.

The court went on to state, "'[t]he mortgage grants the power of sale over the subject property 'to MERS (solely as nominee for [MNI] and [MNI]'s successors and assigns) and to the successors and assigns of MERS." *Id.* at 4. "Furthermore, the mortgage provides that 'MERS … has the right: to exercise any or all of [the interests held by MNI], including, but not limited to, the right to foreclose and sell the Property.'" *Id.* at *4.

The Appeals Court essentially reaffirmed its holding in *Shea v. Federal Natl. Mort. Assn.*, 87 Mass. App. Ct. 901 (2015), interpreting language identical to that of this mortgage, the court explicitly rejected Epps's contention. Epps urged the Appeals Court to find that, "despite the fact that the mortgage provides that 'MERS is the mortgagee under this Security Instrument' and that MERS holds 'legal title to the interests granted by Borrower in this Security Instrument,' MERS did not obtain the status of mortgagee because MERS never held the note." *Shea* at 902-903.

That argument was not persuasive. "MERS's interest as mortgagee was not 'inherently invalid because it was separated from ownership of the underlying debt.'" *Id.* at *5 (internal citations omitted). "MERS was the lawful mortgagee, and there was no requirement that the foreclosing entity also hold the note." *Id.* at *5 (internal citations omitted). See also, *Eaton v. Federal Natl. Mort. Assn.*, 462 Mass. 569, 588-589 (2012) (requirement that foreclosing entity hold note or authorize foreclosure applies only when statutory notice provided after June 22, 2012).

Ben Adeyinka received the association's Emerging Leader Award at REBA's annual meeting and conference on Nov. 7. He is a member of a number of REBA sections including Affordable Housing and New Lawyers. Adeyinka also serves on the Amicus Committee and the Strategic Communications Committee. He is currently the administrative attorney for Housing Court, where he works closely with the Deputy Court Administrator Paul J. Burke and the Housing Court Chief Justice Timothy F. Sullivan. Adeyinka can be contacted by email at adeyinkaesq@gmail.com.