

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-10744

**THE REAL ESTATE BAR ASSOCIATION
FOR MASSACHUSETTS, INC.,**

Plaintiff

v.

**NATIONAL REAL ESTATE INFORMATION SERVICES and
NATIONAL REAL ESTATE INFORMATION SERVICES, INC.**

Defendants

Certification of Questions from United States Court of
Appeals for the First Circuit

**BRIEF OF AMICUS CURIAE NORTH AMERICAN
BAR-RELATED TITLE INSURERS AND
CONNECTICUT ATTORNEYS TITLE INSURANCE COMPANY**

Thomas Frisardi/BBO #552479
Kendra A. Kinscherf/BBO #670472
Davis, Malm & D'Agostine, P.C.
One Boston Place
Boston, MA 02108
617.367.2500

TABLE OF CONTENTS

Table of Authorities ii

Statement of Interest of Amicus Curiae 1

Introduction 2

Argument 3

 I. A Title Insurance Policy Is not a Substitute for
 an Attorney’s Services in Conducting a
 Conveyance. 3

 A. The Basics of Title Insurance..... 3

 B. Title Insurance Is Unlike other Forms of
 Insurance..... 4

 C. Title Insurance Does Not Substitute for Advice
 from an Attorney..... 6

 II. The Court Should Declare that NREIS Is Engaged
 in the Unauthorized Practice of Law. 9

 III. Rule 5.7 of the Massachusetts Rules of
 Professional Conduct Does Not Define What
 Constitutes the Practice of Law. 12

Conclusion 12

TABLE OF AUTHORITIES

	Page(s)
CASES	
<u>Greenfield Country Estates Tenants Assoc., Inc. v. Deep</u> , 423 Mass. 81 (1996).....	8
<u>Private Lending & Purchasing, Inc. v. First American Title Ins. Co.</u> , 54 Mass. App. Ct. 532 (2002).....	3, 4, 7, 8
<u>Somerset Sav. Bank v. Chicago Title Ins. Co.</u> , 420 Mass. 422 (1995).....	7
STATUTES	
G.L. c. 93, § 70	10, 13
RULES	
S.J.C. Rule 3:07, Mass. R. Prof. C. 5.7	12
OTHER AUTHORITIES	
J.D. Palomar, <u>Title Insurance Law</u> (Thomson Reuters 2009).....	2, 4, 5
W. P. Graham, <u>Title Insurance</u> (MCLE 2010)	2, 4

STATEMENT OF INTEREST OF AMICUS CURIAE

North American Bar-Related Title Insurers[®]

("NABRTI") is a trade association of eight title insurance underwriters and agents that conduct their business through the use of real estate attorneys in fifteen states, including the Commonwealth of Massachusetts, and Canada. More than 15,000 attorneys are represented by NABRTI, including more than 600 in the Commonwealth.

Connecticut Attorneys Title Insurance Company[®]

("CATIC") is a member of NABRTI. CATIC does business in the Commonwealth of Massachusetts as a title insurance underwriter. It has appointed more than 600 agents in the Commonwealth. Its insureds include both citizens and mortgage lenders across the Commonwealth.

The members of NABRTI believe that it is in the public interest for consumers to be represented by competent counsel when purchasing, selling, and refinancing their homes. Title insurance is not a substitute for the advice of an attorney in a purchase or refinancing transaction. Requiring attorneys to conduct conveyances of real property provides owners

and lenders with protections that they cannot obtain through title insurance.

INTRODUCTION

Since the late 1800s, title insurance has been available in the United States to provide property owners and lenders with a source of recovery for financial losses due to defects in title. W. P. Graham, Title Insurance § 4.1.1 (MCLE 2010). Title insurance became more widely used with the growth of the secondary market for the resale of mortgages because investors demanded title insurance to protect their investments. J.D. Palomar, Title Insurance Law § 1.3 (Thomson Reuters 2009).

Title insurance complements, rather than replaces, an attorney's determination as to the status of title to the real estate being conveyed. The public interest is best protected by continuing to require that attorneys conduct real property conveyances, whether in purchase and sale or in refinancing transactions.

NABTRI and CATIC urge this Court to answer both questions certified by the Court of Appeals for the First Circuit in this case in the affirmative.

ARGUMENT

I. A TITLE INSURANCE POLICY IS NOT A SUBSTITUTE FOR AN ATTORNEY'S SERVICES IN CONDUCTING A CONVEYANCE.

A. The Basics of Title Insurance.

Title insurance policies are contracts of indemnity that protect the financial interest of an owner or lender in real property against loss due to unknown title defects, liens, or other matters. Title insurance is available as owner's title insurance or as mortgagee's (lender's) title insurance. Although lenders practically always require mortgagors to purchase a mortgagee's title policy, mortgagors are not insured under those policies. The mortgagor, that is, the property owner, is insured and protected against encumbrances and defects only if the mortgagor also purchases a separate owner's title insurance policy.

Further, as described in greater detail in the following two sections, the owner's protection may be limited by the terms of the policy. The policy only insures against matters that are related to or affect title. See, e.g., Private Lending & Purchasing, Inc. v. First American Title Ins. Co., 54 Mass. App. Ct. 532, 536 (2002). It does not insure against matters

disclosed on the policy that are excluded or excepted from coverage. Id. at 536-37. It may not insure against certain title issues or other matters outside of title records that are important to the use and enjoyment of the property for which title is insured.

B. Title Insurance Is Unlike other Forms of Insurance.

Although title insurance is similar in some respects to other forms of insurance, such as indemnification for losses, title insurance is distinctive in several key respects. Palomar, Title Insurance Law §§ 1:9-1:14.

Unlike other forms of insurance that protect against future events, title insurance protects against past events. Graham, Title Insurance § 4.1.3. Thus, the issuance of a title insurance policy depends upon an examination of the existing public title records at the registry of deeds and an abstract based on the results of the title examination.¹ The title agent issues a commitment to furnish title insurance on behalf of the title insurer only after reviewing

¹ NABRTI and CATIC do not argue, however, that conducting title examinations and creating title abstracts, or the physical act of issuing title insurance, constitute the practice of law.

the title abstract in light of in rem federal and state law. Palomar, Title Insurance Law § 1:15.²

Another way in which title insurance differs from other forms of insurance is that the agent need not consult with the insured or the insurance company in order for the policy to issue. With other forms of insurance, the insurance company, not the agent, makes the decision whether to underwrite the risk associated with the policy to be issued based on information that the agent collects from the potential insured and furnishes to the insurer. With title insurance, however, the agent generally decides whether to furnish coverage after reviewing the title abstract, without any input from the insurer. The title agent makes independent judgments for the insurer regarding the state of the title that are similar to those made by a conveyancer. Such judgments include determining whether there are defects in the legal title to the property and what title issues should be listed as exceptions from coverage.

² As discussed below, however, significant risks may still remain for the buyer of the property if the attorney/agent also does not conduct the conveyancing and explain these risks.

One further point of difference between other forms of insurance and title insurance is that title insurance is not regulated in Massachusetts. There are no state agencies setting standards for, or policing, the title insurance industry in the interests of consumers. Using a title agent who is also an attorney currently is the only means of providing consumers with protection beyond what is contractually required by a title policy. Reliance on claims of breach of contract and negligence may not provide consumers with adequate protection, because such actions are often difficult.

C. Title Insurance Does Not Substitute for Advice from an Attorney.

As noted above, a title agent determines whether there are encumbrances disclosed on the record title that should be listed as exceptions from the coverage provided by the title insurance policy. Merely listing such exceptions on the policy, however, does not automatically cause the buyer or borrower to understand the significance of the items listed. This is particularly true since the title insurance company does not have a duty to render a title opinion for the insured or to disclose defects in title of which it

may be aware. Private Lending & Purchasing, Inc., 54 Mass. App. Ct. at 532, 539. In fact, an owner's use of property may be severely affected by these exceptions and other defects, without any insurance to compensate for the impact.

There are also general exceptions and exclusions from coverage, including claims such as adverse possession, boundary line disputes that would have been revealed in an accurate survey, and easements not shown in the public records. Governmental regulations of property (e.g., zoning and environmental laws) also are excluded from coverage unless a notice of a defect, lien, or encumbrance has been recorded for the property. See, Somerset Sav. Bank v. Chicago Title Ins. Co., 420 Mass. 422, 428 (1995) (noting that "building or zoning laws are not encumbrances or defects affecting title to property" and noting that "[t]here is a difference between economic lack of marketability, which concerns conditions that affect the use of land, and title marketability, which relates to defects affecting legally recognized rights and incidents of ownership."). Such matters will not be listed specifically as exceptions in the policy, but nonetheless affect the use of property.

Yet another limitation of title insurance is that money to clear title or to pay damages may not be adequate compensation for the property owner. The decision to purchase a home is a unique, personal, and emotional decision. The law, therefore, has long recognized that monetary damages may not be adequate compensation for a loss of real property rights. See, e.g., Greenfield Country Estates Tenants Assoc., Inc. v. Deep, 423 Mass. 81, 88 (1996). There also may be significant limitations on monetary recovery if, for example, the title insurance policy does not take into account increases to the property's fair market value.

The exclusions and exceptions to insurance coverage, as well as the limits on protection that title insurance provides, are of importance to the buyer or borrower and can significantly impact use of the property. Without an attorney at the closing, who understands the title examination and abstract, as well as matters outside of title records and the nature of title insurance, the buyer may be unaware of facts that would cause the buyer not to go forward with the purchase had the buyer known them. Private Lending & Purchasing, Inc., 54 Mass. App. Ct. at 539.

If the closing attorney is merely a "paper pusher" and simply performs the ministerial function of overseeing the execution of the documents without any knowledge of the status of title, as appears to be the case with NREIS, homebuyers will not be apprised of any title issues that threaten the enjoyment of their property unless they have engaged separate counsel. Given the cost of separate representation and a general unawareness of such risks among lay persons, the typical buyer is likely to forgo this step.

Title insurance does not close this gap in protection of consumers that NREIS's practices creates. Title insurance is not an effective substitute for having attorneys review the title examination and conduct the settlement of any conveyance of real property.

II. THE COURT SHOULD DECLARE THAT NREIS IS ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW.

As described in the record, NREIS conducts closings through attorneys whose only job is to notarize signatures on documents that were already prepared prior to the closing. These attorneys have no knowledge of the property, its legal title, or even

the contents of the closing documents. These attorneys are unable to explain the documents, are unable to describe the state of the title to buyers, and are unable to provide the legally required title certification pursuant to G.L. c. 93, § 70 because NREIS either controls or manages all other aspects of the conveyancing.

The Court should rule that NREIS's practices constitute the unauthorized practice of law and unequivocally find that conveyancing must be conducted by an attorney.³

Moreover, having an attorney serve both as title agent and closing attorney best comports with the expectations of homebuyers and borrowers. Homebuyers, in particular, rely on the conveyancer during the closing process. When the attorney conducting the conveyance of real property is also the title agent, the closing is likely to include an explanation of the title insurance policy and its limitations, including the need for an owner's policy, clarifying for the consumer what the title policy does and does not protect against.

³ But see, n. 1, supra.

CATIC's use of attorneys as title agents, as is the practice of the other members of NABRTI, ensures that the exceptions identified on the title policy correctly reflect the record title and best protects the interests of homeowners and lenders. The commission for issuing the title insurance policy pays for the examination of the legal title that is used in the conveyance and the title policy. This relationship is advantageous to the homebuyer and the lender. Rather than having to pay for the costs of multiple attorneys and a title agent who are performing some of the same services, having one attorney issue the title policy on behalf of the insurer and represent both the home buyer and lender minimizes duplicative efforts and reduces the costs of conveying property in Massachusetts.

Based upon the economics of conveyancing, if the role of the closing attorney is limited to gathering signatures, as is the practice of NREIS, then the dual representation system in Massachusetts may not survive and the above-mentioned benefits will be diminished, to the detriment of consumers and lenders.

III. RULE 5.7 OF THE MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT DOES NOT DEFINE WHAT CONSTITUTES THE PRACTICE OF LAW.

Arranging for title insurance is a law-related service. S.J.C. Rule 3:07, Mass. R. Prof. C. 5.7, 426 Mass. 1412 (1998). NREIS's argument that comment 9 to Rule 5.7 requires this Court to hold that its activities are not the practice of law is misplaced. As indicated in the preamble and scope sections of the rules, the comments are simply guidelines and are not intended to substitute for the case-by-case determination undertaken by this Court.

The significance of Mass. R. Prof. C. 5.7 to the controversy before the Court is that an attorney who simultaneously serves as the title agent and conveyancing lawyer must satisfy the Rules of Professional Responsibility in both roles. This is of benefit to consumers, as discussed in Section I, supra, and one further reason why this Court should declare that NREIS's practices are unlawful.

CONCLUSION

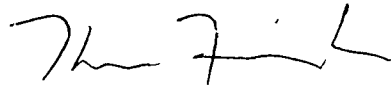
NABRTI and CATIC believe that requiring conveyances of real property to be conducted by attorneys provides all of the parties to real estate transactions with important protections, which title

insurance, alone, cannot provide. NABRTI and CATIC therefore urge this Court to find that NREIS's conveyancing practices, including holding and disbursing funds and hiring "closing attorneys" that do not have a thorough understanding of the particular transaction and are unable to provide any explanation or advice regarding the transaction and the title policies, constitute the unauthorized practice of law. Further, this Court should rule that NREIS's process whereby "closing attorneys" fail to provide the certification of title due to their lack of appropriate knowledge regarding the conveyancing transaction violates G.L. c. 93, § 70.

Respectfully submitted,

NATIONAL REAL ESTATE INFORMATION
SERVICES AND CONNECTICUT
ATTORNEYS TITLE INSURANCE
COMPANY,

By their attorneys,

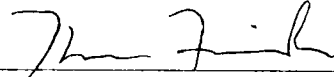


Thomas Frisardi (BBO# 552479)
tfrisardi@davismalm.com
Kendra Kinscherf (BBO# 670472)
kkinscherf@davismalm.com
Davis, Malm & D'Agostine, P.C.
One Boston Place
Boston, MA 02108
(617) 357-2500

Dated: October 26, 2010

CERTIFICATE OF COMPLIANCE WITH RULES

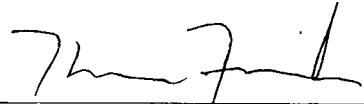
Pursuant to Mass. R. App. P. 16(k), I certify that this brief complies with the rules of court that pertain to the filing of brief.



Thomas Frisardi

CERTIFICATE OF SERVICE

I hereby certify that two copies of this brief were served by hand on October 26, 2010, upon the attorneys of record for Real Estate Bar Association for Massachusetts, Inc. - Douglas W. Salvesen, Esquire and Anthony B. Fioravanti, Esquire, Yurko, Salvesen & Remz, P.C., One Washington Mall, 11th Floor, Boston, MA 02108-2603; National Real Estate Information Services and National Real Estate Information Services, Inc. - Michael D. Ricciuti, Esquire, Irene C. Freidel, Esquire, Michael DeMarco, Esquire, and Robert W. Sparkes III, Esquire, K&L Gates LLP, State Street Financial Center, One Lincoln Street, Boston, MA 02111.



Thomas Frisardi