

No. 09-1809

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

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

Plaintiff/Appellant

v.

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

Defendants/Appellees

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF APPELLANT

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

By its Attorneys,

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February 5, 2010

CORPORATE DISCLOSURE STATEMENT

The Appellant The Real Estate Bar Association For Massachusetts, Inc. ("REBA"), formerly known as Massachusetts Conveyancers Association, Inc., is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts. REBA is a real estate bar association established more than 150 years ago, and currently has approximately 2,200 members. There is no parent corporation or publicly-held corporation that owns 10% or more of REBA's stock.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure, REBA requests that the Court permit oral argument of this appeal. Oral argument by the parties will assist the Court in deciding the numerous and significant state and federal issues raised by this appeal.

JURISDICTIONAL STATEMENT

This matter was filed in Massachusetts Superior Court and removed to the District Court by the Appellee National Real Estate Information Services, Inc ("NREIS") pursuant to 28 U.S.C. § 1332. NREIS also asserted subject matter jurisdiction over its Counterclaim pursuant to 28 U.S.C. §§ 331, 1343, and 2201. The Court of Appeals has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

The April 13, 2009 Judgment of the District Court is a final judgment that disposes of all parties' claims. On May 7, 2009, REBA moved to Amend and Clarify the District Court's Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. That motion was denied on May 7, 2009. On June 2, 2009, REBA filed a timely Notice of Appeal from the April 13, 2009 Judgment and the denial of the Rule 59(e) Motion. On August 17, 2009, the District Court entered an Order allowing NREIS's Motion for Attorney's Fees and Costs. On August 28, 2009, REBA filed a timely Amended Notice of Appeal from the August 17, 2009 Order.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Practice of Law Issues

1. Whether the evaluation of one's legal rights in title to real property and the undertaking of those actions necessary to transfer those legal rights from one person to another comes within the meaning of "conveyancing" or otherwise constitutes the practice of law under Massachusetts law, or whether "conveyancing" refers only to attending and witnessing the signing of the documents related to a real estate transaction.

2. Whether the issuance of title insurance, which is premised on the same title examination undertaken to convey real property, is also the practice of law in Massachusetts.

3. Whether other activities undertaken by NREIS, including (a) providing a deed to the parties to a real estate transaction, (b) providing legal services to clients through attorneys hired by NREIS, and (c) managing the process by which legal rights are created in real property, constitute the practice of law under Massachusetts law.

Dormant Commerce Clause Issues

4. Whether an argument advocated by a litigant unsuccessfully in a court proceeding can, by itself, constitute unlawful interference with interstate commerce and violate the dormant Commerce Clause in the absence of an unconstitutional state law.

5. Whether a non-profit bar association's petition to the Massachusetts Superior Court in accordance with G.L. c. 221, § 46B to enjoin activities alleged to be the unauthorized practice of law constitutes "state action."

6. Whether a requirement that only attorneys perform those conveyancing activities determined to be the practice of law unlawfully interferes with interstate commerce.

7. Whether there is any evidence in the record to support the District Court's finding that it was "highly unlikely that Massachusetts lawyers could provide the same services at the same expense to the customer as NREIS provides."

STATEMENT OF THE CASE

Nature Of The Case.

This is an appeal from a decision of the District Court (Tauro, J.) granting NREIS's Motion for Summary Judgment on REBA's claims, denying REBA's Cross-Motion, and granting NREIS's Motion for Summary Judgment on its Counterclaim.

Course of Proceedings.

A. REBA's Complaint Is Removed To Federal Court.

This action was filed by REBA in Suffolk Superior Court against Defendants National Real Estate Information Services, Inc., a Pennsylvania corporation, and National Real Estate Information Services, a Pennsylvania limited partnership. REBA sought a declaratory judgment and an order restraining Defendants from conveying property in Massachusetts. NREIS denied that it was engaged in the unauthorized practice of law and removed the action to the federal court. In its 42 U.S.C. § 1983 Counterclaim, NREIS claimed that, if REBA was successful in the pending litigation, NREIS would be deprived of rights secured by the Constitution under the dormant Commerce Clause.

B. Parties' Summary Judgment Motions.

In October 2008, NREIS filed a Motion for Summary Judgment. In December 2008, REBA opposed the Motion and filed a Cross-Motion for Summary Judgment. In February 2009, NREIS opposed the

Cross-Motion and filed a Motion for Summary Judgment on its dormant Commerce Clause Counterclaim.

C. The District Court's April 13, 2009 Judgment.

On April 13, 2009, the District Court issued a Memorandum and Order granting NREIS's two Motions for Summary Judgment and denying REBA's Cross-Motion. The District Court acknowledged that the SJC had stated that "the practice of law ... embraces conveyancing," but also found that "the SJC has not explicitly addressed whether the practice of law embraces all the interconnected activities of a real estate conveyance." [Record Appendix ("RA") 893]. Nevertheless, the District Court held that there was an "expectation" under Massachusetts law that an attorney have "some involvement" in "preparing for and conducting the closing." [RA.895].

The absence of controlling state law precedent prompted the District Court to decide NREIS's § 1983 Counterclaim. The District Court concluded that REBA's interpretation of Massachusetts law violated the U.S. Constitution. It enjoined REBA from enforcing its interpretation on NREIS. On June 2, 2009, REBA filed a timely Notice of Appeal from District Court's Judgment.

D. REBA's Motion For Clarification Is Denied.

On April 27, 2009, REBA requested that the District Court clarify its Judgment. Specifically, REBA requested that the District Court (1) clarify what activities constitute the "preparation" for a real estate closing; and (2) determine whether NREIS and the attorneys it hires must comply with the Title Certification Statute, G.L. c. 93, § 70. NREIS opposed the Motion. The District Court denied it without comment.

E. NREIS Awarded \$904,076.17 In Attorney's Fees.

On April 27, 2009, NREIS filed a Motion for Attorney's Fees and Costs under 42 U.S.C. § 1988. REBA opposed the Motion. Following a hearing, the District Court allowed NREIS's Motion for Fees in the full amount requested. On August 28, 2009, REBA filed a timely Notice of Appeal from the award.

F. REBA's Motion to Stay and Motion to Certify Questions.

Following the Judgment, REBA filed a Motion to Stay Execution which was opposed by NREIS. In October 2009, the District Court denied the Motion. REBA filed a Motion to Stay Execution pending Appeal with this Court, which was opposed by NREIS. That Motion is currently pending. On October 27, 2009, REBA filed a Motion to Certify Questions to SJC which was opposed by NREIS. That Motion is currently pending.

STATEMENT OF FACTS

A. The Role Of The Conveyancing Attorney.

The sale of residential real estate generally involves three parties.¹ The seller and the buyer are parties to a Purchase and Sale Agreement. [SRA.2, ¶¶1-2] The buyer also has an agreement with a lender to provide mortgage financing. [SRA.2, ¶3] After the parties enter into their respective agreements, they entrust their transaction to a conveyancing attorney. [SRA.3, ¶¶4-6]

The role of the conveyancing attorney is to complete the parties' transactions and ensure that their contractual obligations to one another are fulfilled. He determines that the seller has "good and clear record and marketable" title to the property, ensures that the deed proffered by the seller validly transfers that title to the buyer, and confirms that the mortgage validly protects the lender. [SRA.3, ¶4] The conveyancing attorney pays the consideration to the parties in accordance with their agreements and establishes their rights in the property. [SRA.10, ¶36] As described below, this function necessarily involves judgments as to the parties' legal rights and obligations. For this reason,

¹ The facts concerning conveyancing in Massachusetts that are described in REBA's Statement Of Material Facts (see pages 1-20 of the Sealed Record Appendix ("SRA")), are taken from the Affidavit of Kathleen M. O'Donnell, Esq. Attorney O'Donnell is a conveyancing attorney with more than 30 years of residential real estate conveyancing experience. A copy of the O'Donnell Affidavit is attached hereto as part of the Addendum.

conveyancing in Massachusetts has traditionally been conducted by attorneys. [SRA.3, ¶6]

NREIS, which is not authorized to practice law, provides such conveyancing services in Massachusetts. [SRA.13, ¶¶43-44] Those services include title examinations, property searches, loan satisfaction document reviews, full closings, and "witness only" closings. [SRA.13, ¶45] For the most part, NREIS does not provide these services itself. Instead, it subcontracts portions of the conveyancing work out to vendors (both attorneys and non-attorneys) whom it manages. [SRA.13, ¶44]

B. Procedures For Conveying Real Property In Massachusetts

The Appeals Court has observed that "[o]f the many areas of law practice, conveyancing is one which lends itself particularly to formulation through decisional law and commentary as to what are appropriate procedures." Fall River Sav. Bank v. Callahan, 18 Mass. App. Ct. 76, 83, 463 N.E.2d 555 (1984). The commentary detailing and explaining those "appropriate procedures" is voluminous and takes up a number of shelves in any law library. [RE.303] In brief, the appropriate procedures consist of evaluating the title to the real estate being sold and undertaking the steps required to transfer the legal interests in that property. [SRA.3, ¶5] As described more fully below, each of these appropriate procedures requires a legal judgment based on an assessment of Massachusetts state and federal law.

1. The Conveyancing Attorney Reviews A Title Abstract And Documents Of Record To Make A Judgment That The Seller Has "Good And Clear Record And Marketable" Title That Can Be Validly Transferred.

Under the typical Purchase and Sale Agreement, the seller has agreed to sell, and the buyer has agreed to buy, "good and clear record and marketable" title to the property. [SRA.2, ¶2] Consequently, the first step for the conveyancing attorney is to determine whether the seller actually has "good and clear record and marketable" title to the property that he can transfer.

[SRA.4, ¶8] Because Massachusetts is a so-called "title theory state"² where a mortgage is considered to be a conveyance in fee, the same evaluation of title must be undertaken by the conveyancing attorney to determine whether the buyer will be able to provide the lender with "mortgage covenants." G.L. c. 183, § 19.

The examination of title to assess the quality of a record title generally begins at the registry of deeds, and often the registry of probate, in the county where the land lies. [SRA.4, ¶10] It is common for a conveyancing attorney to use the services of a title abstractor to create a title abstract. [Id.] A title abstract is simply a written document "summarizing the history of a piece of land, including all conveyances, interests, liens, and

² See Faneuil Investors Group, L.P. v. Bd. of Selectmen of Dennis, 75 Mass. App. Ct. 260, 264-65, 913 N.E.2d 908 (2009) ("Under our title theory of mortgages, ... the granting of a mortgage vests title in the mortgagee"). The mortgage instrument is actually a deed. G.L. c. 183, §§ 18 and 19.

encumbrances that affect title to the property."³ The conveyancing attorney reviews copies of the deeds, mortgages, wills, and other instruments pertaining to the real estate. [SRA.5, ¶13]

The title examination ordinarily extends back at least fifty years to a deed that the conveyancing attorney determines is good on its face. [SRA.5, ¶12] The examination of documents found at the registry may disclose any number of clouds on the title or encumbrances on the property, including those arising from a problem with a right of access to the property, adverse possession, attachments, bankruptcy filings, condominium issues, inaccurate descriptions in a deed, improper mortgage discharges, the pendency of divorce proceedings, easements, executions, homesteads, leases, lis pendens, mechanics' liens, mortgage foreclosures, uncertain powers of attorney, or tax liens, missing heirs, among others. [SRA.5, ¶14] It is not possible to list here all the myriad problems that can be found from a title examination. There are a number of title defects that may be identified as routine, such as the identification of outstanding mortgages that need to be discharged, but many are more complex and require a substantive knowledge of Massachusetts real estate law. [SRA.6, ¶15]

³ BLACK'S LAW DICTIONARY (8th ed. 2004). See also 5 F. Talty, et al., Massachusetts Practice: Methods Of Practice § 7:2 (2000) ("abstract of title consists of a series of sheets each of which contains a summary of the material parts of a recorded instrument affecting title to the property").

When the title examination reveals a cloud on the title, it must ordinarily be removed or cured before the parties will go forward with the transaction. [SRA.6, ¶19] In some instances, the defect can be resolved by the conveyancing attorney directly. [SRA.7, ¶21] In other situations, the buyer or other person may be required to take some action to resolve the issue. [SRA.7, ¶¶21-22]

- *NREIS Retained A Company That It Believed Was A Law Firm To Perform Title Evaluations.*

One of the services provided by NREIS to its lender customers is a title search. [SRA.14, ¶46] NREIS acknowledged that, because it was not able to practice law, it was not qualified to conduct title examinations or assess the status of title. [SRA.14, ¶47] NREIS hired Connolly Title Services, Inc. to conduct title examinations and determine if the seller had valid legal title to the property.

[SRA.14, ¶¶48-49] NREIS believed that Connolly Title was a law firm and relied on it to perform a "plenary search" of the real estate title, "establish[] that there is clear title to the property," and provide NREIS with a report containing "[t]heir interpretation of the status of title." [Id.]

In fact, in the course of this litigation, NREIS learned that Connolly Title was not a law firm and none of its

employees is an attorney. [SRA.15, ¶50] Connolly Title does not perform "any legal analysis or review" of the title.

[SRA.15, ¶51] Instead, it provides NREIS with abstracts only and "basically reports what [it finds] of record in the registry of deeds." [Id.] Consequently, no one connected with NREIS reviews the status of title to the properties being conveyed to ensure that the sellers actually own the properties and have "good and clear record and marketable" title. [SRA.16, ¶52]

2. Massachusetts Title Certification Statute, G.L. c. 93, § 70, Requires The Lender's Attorney To Conduct A Title Examination And Certify Title To The Lender And To The Purchaser.

Where the transaction involves the mortgage of residential real estate, G.L. c. 93, § 70, requires the lender's attorney to examine the property title records for a period of fifty years. The attorney must then provide the purchaser with a certification that the purchaser holds "good and sufficient record title to the mortgaged premises free from all encumbrances" except only those matters which are listed in the certification. The statute specifically states that the certification must come from the "attorney" for the mortgage lender.

- *NREIS Fails To Provide Certifications Of Title Required By Massachusetts Title Certification Statute, G.L. c. 93, § 70.*

NREIS has acknowledged that NREIS does not provide the certifications of title to the purchaser that are required under G.L. c. 93, § 70. [SRA.16, ¶53]

3. The Conveyancing Attorney Directs The Settlement Of The Transaction At Which The Parties Execute The Appropriate Legal Documents To Effect The Conveyance And Exchange Consideration.

If the conveyancing attorney determines that the title to the property is satisfactory, the settlement of the real estate transaction is scheduled. [SRA.8, ¶24] At the settlement, sometimes referred to as the "closing," the parties meet, execute the necessary documents to effect the conveyance, and exchange the consideration required by their contracts. [Id.]

Many of the documents executed by the parties are required by the secondary market for mortgages and others are required by Massachusetts law. [SRA.8, ¶25] Depending on whether the transaction is a purchase or a refinance, the documents ordinarily include the application for the mortgage loan, the acceptance of the mortgage commitment, an agreement between the buyer and seller as to the adjustment of property taxes, an affidavit of owner occupancy, a notice of the lead paint law provisions and a release of the lender from liability for any violations (G.L. c. 111, §§ 190-99 and 105 C.M.R. 460.00, et seq.), a smoke

detector certification agreement (G.L. c. 148, §§ 26E and 26F), a certificate regarding the presence of an approved carbon monoxide alarm in conformance with the requirements of the board of fire prevention regulations (G.L. c. 148, § 26F1/2), a certificate of nonforeign status, an affidavit of the seller to permit the lender to obtain title insurance without exceptions for mechanics liens and persons in possession, the truth-in-lending disclosure statement required by Regulation Z (15 U.S.C. §§ 1601-1638), a disclosure of the lender's intent concerning the assignment of servicing of the mortgage loan (12 U.S.C. § 2605(a)), the promissory note, and the mortgage with any applicable riders.

[SRA.8, ¶26]

There may be additional loan documents depending on other factors, such as whether the home being bought is new construction, whether the property is a condominium or co-op, and how title to the property is held. [SRA.8, ¶26] Where the borrower is refinancing a mortgage, he must also be provided with a notice of his right to rescind before the expiration of three business days. [Id.] The lender's conveyancing attorney reviews these documents for accuracy and completeness to ensure that, if executed properly, they will provide the lender with a valid interest in the property. [SRA.10, ¶30]

In addition to the loan documents listed above, the conveyancing attorney prepares a settlement statement which

accounts for the proceeds of the transaction. [SRA.9, ¶27] For all federally regulated mortgage loans, the conveyancing attorney is required as "settlement agent" to complete a Uniform Settlement Statement provided for under Regulation X at 24 C.F.R. 350. [Id.] The Settlement Statement identifies the collection and disbursement of the funds in conformity with the parties' respective contractual obligations. [Id.] In order to prepare the Settlement Statement accurately, the conveyancing attorney reviews the parties' Purchase and Sale agreement and any other relevant documents. [Id.]

Where the transaction involves a purchase, the conveyancing attorney also makes any necessary adjustments to collected rents, mortgage interest, prepaid premiums on insurance, if assigned, water and sewer charges, operating expenses (if any), according to any schedule attached to the parties' agreement, and taxes for the then current year. [SRA.9, ¶27] Following execution by the buyers and sellers, the conveyancing attorney then executes the Settlement Statement and certifies that it is accurate and that disbursement of the funds will be made in accordance with the Statement. [SRA.10, ¶31]

The conveyancing attorney also reviews and passes on all title documents. [SRA.9, ¶29] The conveyancing attorney reviews the deed provided by the seller to ensure that it conforms to the terms of the parties' contract, contains the correct description,

as determined by the title examination, and that it is properly dated, signed and acknowledged. [Id.] In both a purchase transaction and a refinance, the conveyancing attorney also ensures that all the requirements specified in the mortgage commitment have been satisfied and all contractual obligations between the parties have been met. [SRA.10, ¶30]

4. At The Settlement, The Conveyancing Attorney Responds To Questions Posed By The Parties.

The parties to a residential real estate transaction almost always have questions regarding the loan documents, the disbursement of the funds as reflected in the Settlement Statement, the mortgage obligations, and other matters regarding the transaction. [SRA.10, ¶32] Having reviewed the title to the real estate and the loan documents, the conveyancing attorney is in a position to respond to those questions. [Id.]

- *NREIS Employs A Non-Attorney Company Based In Las Vegas To Draft Deeds.*

For conveyances which require a deed, NREIS provides the parties with a deed which it obtains from a non-lawyer company located in Las Vegas, Nevada. [SRA.17, ¶59]

- *NREIS Retains An Attorney To Attend The Settlement To Notarize The Parties' Signatures.*

NREIS hires a Massachusetts attorney on behalf of its client to attend the signing of the closing documents and

notarize the parties' signatures. [SRA.17, ¶55] However, the attorney is not provided with any title information about the property and is not involved in the examination or review of the title. [SRA.17, ¶57] The attorney has no ability to determine if the grantor even has any legal interest in the property or answer questions regarding the title to the property.

5. The Conveyancing Attorney Requires A Final Run-Down, Records The Title Documents And Disburses The Mortgage Proceeds.

At the settlement, the parties' consideration supporting the transaction, i.e., the deed, the mortgage, and the purchase monies, are entrusted to the conveyancing attorney. [SRA.11, ¶33] The conveyancing attorney requires a final run-down of the title at the registry of deeds be performed to ensure that the status of the title has not changed. [SRA.11, ¶34] If the conveyancing attorney determines that, in his judgment, there have been no changes in the title, he records the deed, the mortgage, and any other documents necessary to establish the parties' legal rights. [Id.] While the execution and delivery of the deed is sufficient to transfer the property interest between grantor and grantee, the conveyance is not complete until the required documents of title are recorded. [SRA.17, ¶33].

After the deed and mortgage are recorded, the conveyancing attorney disburses the loan proceeds in accordance with the

Settlement Statement. [SRA.11, ¶35] The disbursement may include paying any real estate taxes that are due, paying any other encumbrances on the property, obtaining discharges or releases, consistent with the parties' obligations and the lender's instructions, and paying commissions due to the real estate brokers in a purchase transaction. [Id.] Once the appropriate documents are recorded and the payments made, the conveyancing attorney reports and transmits all documents to the lender.

6. The Good Funds Statute, G.L. c. 183, § 63B, Provides That The Loan Proceeds May Not Be Held By A Non-Party Like NREIS.

The Good Funds Statute⁴, G.L. c. 183, § 63B, requires that the full amount of the mortgage loan proceeds due to the mortgagor must be transferred to "the mortgagor, the mortgagor's attorney or the mortgagee's attorney" before the deed or the mortgage may be recorded. G.L. c. 183, § 63B. There is no provision in the statutory language for the loan proceeds to be held by a non-party to the transaction, like NREIS.

⁴ The Good Funds Statute was enacted in 1994 to ensure that the mortgage loan proceeds are completely funded before the mortgagor's property is encumbered. Of course, where the mortgage loan proceeds are held by an attorney in his IOLTA account the client also receives the protections of the Client Security Fund.

- *NREIS Violates The Good Funds Statute, G.L. c. 183, § 63B, By Maintaining Possession Of The Mortgage Loan Proceeds.*

NREIS controls the payment of the mortgage proceeds that are due from its lender customer to the various parties to the transaction. [SRA.18, ¶61] Until the mortgage proceeds are disbursed, they remain in NREIS's bank accounts. In violation § 63B, NREIS does not disburse the funds to pay off prior mortgages and any other liens until after the new mortgage executed by the borrower has been recorded. [Id.]

C. A Title Insurance Policy Is Issued Based On The Title Examination Of The Conveyancing Attorney.

Title insurance insures the status of record title at a particular point in time. [SRA.11, ¶36] There are two basic types of title insurance policies: an owner's policy and a lender's policy. The typical owner's policy assures that the legal title to the property is properly vested in the purchaser and that the title is free from all defects, liens and encumbrances except those listed in the policy or those excluded from coverage.

[SRA.12, ¶38] The typical lender's policy is similar but insures the legal validity and enforceability of the lien of the lender's mortgage. [Id.]

A title insurance policy is necessarily based on a thorough title examination to ascertain the status of record title and to identify any defects, liens or encumbrances existing as of the

effective date of the policy. [SRA.11, ¶36] The title insurance companies do not themselves examine the title. [SRA.12, ¶39] Instead, the policy is issued by the conveyancing attorney, who is an agent for the title insurer. The policy is based on his title examination. [Id.]

In accordance with the underwriting guidelines of the title insurer, and based on a review of the title, as described above, the conveyancing attorney makes a determination as to the "quality of title." [SRA.12, ¶40] Whether the conveyancing attorney will issue a policy depends on his evaluation of the status of the title and his determination regarding the defects, liens or encumbrances that impair the title. [SRA.12, ¶40] These may be noted as exceptions to coverage. The determination as to which defects or encumbrances to identify as exceptions, which do not affect the use and enjoyment of the property, and which should be reported to the title insurance company and the parties to the transaction, are all decisions made by the conveyancing attorney. [Id.]

When the conveyancing attorney determines that the "quality of title" disclosed by his examination and in light of *in rem* state and federal law is acceptable and that a legally valid interest in the property has been conveyed to the lender, he issues a title insurance policy. [SRA.12, ¶41] The decision to issue or not to issue a policy is made by the conveyancing

attorney based on this review and not by the title insurance company directly. [Id.] The title insurance company does not control the manner in which the title insurance agent determines the "quality of title." [Id.]

For these reasons, title insurance companies operating in Massachusetts expect their agents to have a professionally reliable knowledge of Massachusetts real estate law. [SRA.13, ¶41]

- *NREIS Issues Title Policies That Are Based On The Title Examinations Performed By Non-Attorneys.*

NREIS is a title agent for a number of title insurers and sells title insurance policies to lenders and property owners. [SRA.18, ¶62] The various agency agreements between NREIS and the title insurance companies provide that NREIS's issuance of a title insurance policy is to be based on its full and complete examination of the records of title to the real estate. [SRA.18-19, ¶¶63-65] For example, the agreement between NREIS and Stewart Title Guaranty Co. provides that:

All title policies must be based on a written or electronic report of title resulting from a complete search and examination of those public records, surveys and inspections relevant to the insurance afforded by such policies. [SRA.19, ¶65]

NREIS does not review the status of title to property in Massachusetts with respect to the issuance of its title policies. [SRA.20, ¶67] NREIS is not competent to undertake the title examination required under its agreements and does

not determine if a property is "insurable." [SRA.20, ¶68] NREIS's Senior Director of Title Operations testified that he did not even have an understanding "as to what the examination of title consists of" for property in Massachusetts. [SRA.19, ¶66] Instead, NREIS issues the title insurance policy based entirely on an abstract provided by a non-attorney, Connolly Title. [SRA.20, ¶67] NREIS merely acts as a scrivener by copying information from the abstract and entering it into a database. [Id.]

SUMMARY OF ARGUMENT

Since 1935, Massachusetts courts have held that the process of conveying a legal interest in real estate is the practice of law to be conducted by attorneys. The District Court agreed that "conveyancing" was the practice of law in Massachusetts but erroneously concluded that in 1935 the SJC intended the "conveyancing" to refer to only one segment of the conveyancing process. The District Court reached its mistaken conclusion by consulting a law dictionary published in 2004 instead of the edition that was available to the SJC in 1935. The District Court also failed to distinguish between the activity of a title abstracter, who does not practice law, and a title examiner, who does. [Pages 25 - 33]

The procedures to convey property in Massachusetts include the evaluation of one's legal rights in title to real property and the completion of those actions necessary to validly transfer those legal rights under the law. An evaluation of those activities (title examination, resolution of title defects, settlement of the transaction, and recordation), which was not undertaken by the District Court, demonstrates that they each depend on a series of judgments as to the legal rights and obligations of others. [Pages 33 - 43]

The issuance of a title insurance policy is premised on the same title examination performed as part of the conveyance.

Therefore, the issuance of title insurance policies in Massachusetts is the practice of law. [Pages 44 - 48]

Not only is NREIS engaged in the unauthorized practice of law by providing conveyancing services in Massachusetts, it is drafting deeds for the parties to the real estate transactions, hiring lawyers to perform legal services for third parties, violating G.L. c. 93, § 70 (Title Certification Statute) and G.L. c. 183, § 63B (Good Funds Statute), and managing the processes through which legal rights in real property are created. All of these practices are unlawful, and risk injury to the public. [Pages 48 - 52]

The District Court's decision that REBA unlawfully interfered with interstate commerce merely by advocating an argument that the Court rejected is without precedent and plainly wrong. The dormant Commerce Clause restricts the States from discriminating against interstate commerce. REBA's petition to the Superior Court is not "state action" and does not burden interstate commerce. If this Court were to restrict non-lawyers from conveyancing, that prohibition would not violate the dormant Commerce Clause. [Pages 52 - 65]

I. THE EVALUATION OF LEGAL RIGHTS IN TITLE TO REAL PROPERTY AND THE UNDERTAKING OF THOSE ACTIONS NECESSARY TO TRANSFER THOSE LEGAL RIGHTS COMES WITHIN THE MEANING OF "CONVEYANCING" OR OTHERWISE CONSTITUTES THE PRACTICE OF LAW UNDER MASSACHUSETTS LAW.

A. The Court Reviews The Practice Of Law Issues Under A De Novo Standard.

The District Court's summary judgment decision construing Massachusetts law regarding the practice of law is reviewed under a *de novo* standard. Bukuras v. Mueller Group, LLC, __ F.3d __, 2010 WL 175085 (1st Cir. 2010).

B. The Practice Of Law Is The Application Of The Law And Legal Principles To Evaluate, Establish, Alter Or Protect A Client's Rights.

The law is that vast normative system of enforceable social rules which govern each individual's life, freedom, social relations, and property. Backed by the coercive power of the state, the law includes constitutional provisions, statutes, administrative regulations, municipal ordinances, and the common law. To give force and effect to this complex legal system, the Commonwealth has sanctioned an independent profession of men and women to practice law by applying general legal principals, case law and statutory provisions to specific factual situations in order to evaluate, establish, alter or protect a client's rights under the law. E.g., Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 180, 52 N.E.2d 27 (1943) (practice of law embraces activities that require the professional judgment of a lawyer). See also American

Bar Association's Proposed Model Definition of the Practice of Law (practice of law is "the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law").

Because the "law pervades all human affairs," it is "not easy to define the practice of law." Loeb, 315 Mass. at 180. Whether a particular activity is the practice of law depends on whether it requires an understanding of the law or legal principles, whether the activity does, or has the potential to, alter the legal rights and obligations of others, and whether the legal nature of the matter is invariably simple or potentially complex. In re Chimko, 444 Mass. 743, 750, 831 N.E.2d 316 (2005) (practice of law involves the exercise of one's "professional judgment in applying legal principles to address [client's] individualized needs").

C. SJC's Statement That The Practice Of Law Includes "Conveyancing" Was Construed Incorrectly By The District Court To Apply To Only One Segment Of The Process Of Transferring Residential Property.

It is well-established that the practice of law "consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court." In re Opinion of the Justices, 289 Mass. 607, 613, 194 N.E. 313 (1935). Although a comprehensive listing of activities which constitutes the prac-

tice of law is impractical, the SJC has stated definitively that the practice of law includes "conveyancing." Id. The activities that must be undertaken to evaluate the legal rights in title to property (see supra at 9 - 13) and the actions necessary to transfer those rights (see supra at 13 - 19) -- in other words, the activities that constitute "conveyancing" are described in the O'Donnell Affidavit. As detailed below, each of these activities -- separately and together -- require the professional judgment of an attorney.

In its Motion for Summary Judgment, NREIS did not defend, or even describe, its activities. It did not identify those activities that constitute "conveyancing." Instead, NREIS asserted incorrectly that REBA's position was that every single task of a conveyance, "no matter how insignificant or mechanical," was automatically the practice of law, and argued that this "position was not supported by precedent. The activities that constitute conveyancing were described in the O'Donnell Affidavit filed by REBA and not disputed by NREIS. In fact, NREIS conceded that the Affidavit provided a "description of how other (Ms. O'Donnell and perhaps other attorneys) might typically perform residential real estate transactions." [RA.382]

The District Court acknowledged that "conveyancing" is the practice of law in Massachusetts. Nevertheless, it found that there was no controlling SJC precedent "directly on point" that

"explicitly addressed whether the practice of law embraces all the interconnected activities of a real estate conveyance."

[RA.893] The District Court ignored as "not helpful" a well-reasoned 2001 Superior Court decision that had determined that "conveyancing" refers to "the various functions concerning the creation, transfer and termination of an interest in real property [and] constitutes the practice of law." Mass. Conveyancers Ass'n, Inc. v. Colonial Title & Escrow, Inc., 13 Mass.L.Rptr. 633, 2001 WL 669280 (Mass. Super. 2001). See also Massachusetts Ass'n of Bank Counsel, Inc. v. Closings, Ltd., 1 Mass.L.Rptr. 87, 1993 WL 818916 (Mass. Super. 1993) (same).

The District Court also disregarded the guidance offered by a Single Justice decision which found that "conveyancing" includes all of the activities undertaken to identify and transfer title to property. In re Eric Levine, 20 Mass. Att'y Disc. R. 311, 2004 WL 5214985 (2004) (rejecting as "not credible" assertions of vendor management company that it was not engaged in the practice of law).

When the District Court could find no SJC decision explicitly listing the various activities that make up "conveyancing," it should have proceeded to an evaluation of whether the activities described in the O'Donnell Affidavit require the professional judgment of an attorney. E.g., In re Shoe Mfrs. Protective Ass'n, Inc., 295 Mass. 369, 372, 3.N.E.2d 746 (1936) (practice

of law cases "must be decided upon [their] own particular facts"). Instead, the District Court sought to divine the SJC's likely understanding in 1935 of the term "conveyancing," merely concluding that the SJC's statement that the practice of law includes "conveyancing" reflects an "expectation" that an attorney have "some involvement" in "preparing for and conducting the closing." [RA.895]. The District Court denied REBA's request to clarify what activities it intended to include in the "preparation" for a real estate closing. [RA.904] As explained below, the District Court's determination that the SJC's reference to "conveyancing" in 1935 was restricted to one segment of the entire conveyancing process is not sufficiently supported.

1. The District Court Erred By Relying On A 2004 Law Dictionary To Divine The Meaning Of A Term Used By The SJC In 1935.

The District Court's conclusion -- that the SJC in 1935 intended "conveyancing" to refer only to "the closing and the preparation therefore" and not also to the investigation of the property's title or the other activities described in the O'Donnell Affidavit -- is premised primarily on the entry for "conveyancing" in the 2004 edition of BLACK'S LAW DICTIONARY. However, the District Court cited only part of the entry. The full entry includes a usage example which defines "conveyancing" to include "investigating title in connection with the creation and assurance of interests in land." BLACK'S LAW DICTIONARY (8th ed.

2004) (emphasis added).

More importantly, if the District Court was going to rely on any reference work, it should have been the edition of BLACK'S LAW DICTIONARY that was available to the SJC in 1935 and not the edition published in 2004. In fact, the Third Edition, published just two years before the SJC issued its 1935 opinion, defined "conveyancing" much more broadly as including the work of the lawyer that "relates" to the transfer of property rights. It expressly included the "investigation of title" to the property being conveyed.

Conveyancing. A term including both the science and art of transferring titles to real estate from one man to another. Conveyancing is that part of the lawyer's business which relates to the alienation and transmission of property and other rights from one person to another, and to the framing of legal documents intended to create, define, transfer, or extinguish rights. It therefore includes the investigation of the title to land, and the preparation of agreements, wills, articles of association, private statutes operating as conveyances, and many other instruments in addition to conveyances properly so called.

BLACK'S LAW DICTIONARY (3d ed. 1933) at 432 (emphasis added).

Other legal dictionaries in print in 1935 confirm that "conveyancing" was understood to refer to more than simply appearing at the settlement of the real estate transaction. Like the 1933 edition of BLACK'S, these dictionaries also define "conveyancing" to include the investigation of the title to the property interest being transferred. See, e.g., WILLIAM E. BALDWIN, BALDWIN'S CENTURY EDITION OF BOUVIER'S LAW DICTIONARY (1926) at 232 (term

"conveyancing" is defined to "include[] the examination of the title of the alienor") (emphasis added); JAMES A. CAHILL, CYCLOPEDIA LAW DICTIONARY (2^d ed. 1922) at 229 (same); FRANCIS RAWLE, BOUVIER'S LAW DICTIONARY (8th ed. 1914) at 672 (same).

2. The SJC's Statement That Title Abstracting May Be Performed By Non-Attorneys Does Not "Undercut" REBA's Contentions In This Case.

The District Court also based its conclusion on a statement in Opinion of the Justices in which the SJC listed the task of searching through the registry records to collect factual information about the property, commonly known as title abstracting, to be not the practice of law. Contrary to the District Court's assumption, this statement does not "undercut" REBA's position. The District Court drew the wrong conclusion because it failed to distinguish the preparation of the title abstract from the title examination at which the title abstract is reviewed.

While preparing a title abstract is not, by itself, the practice of law, it is created for an attorney who uses it to evaluate the seller's rights in the property. Unlike the creation of the title abstract, this title examination "inevitably and necessarily involves consideration of many points of substantive real estate law." E. Mendler, Massachusetts Conveyancers' Handbook with Forms (4th ed. 2008) at 79. See also Comm. on Prof'l Ethics and Conduct v. Baker, 492 N.W.2d 695, 702 (Iowa 1992) ("The abstracter is not practicing law; the title examiner

is"). It is true that "much of the preparation for closing such transactions involve[] obtaining records and documents from various public sources, and then furnishing copies of those records to the parties to the planned transaction." In re Eric Levine, 20 Mass. Att'y Disc. R. at 311, 2004 WL 5214985. However, "those administrative tasks are undertaken to provide the support for what will ultimately comprise the delivery of legal services to the parties." Id.

The SJC noted this distinction in Goldblatt v. Corp. Counsel, 360 Mass. 660, 277 N.E.2d 273 (1971), a case also cited incorrectly by the District Court. In Goldblatt, the SJC observed that "persons, who are not attorneys, may do research in the registries of deeds, make reports (and even recommendations) to attorneys." Id. at 665(emphasis added). The SJC recognized that it is only because *the person for whom the title abstract is provided* is an attorney, and not the client, that these activities are not the practice of law. The delegation of fact-gathering tasks to non-lawyers in litigation, probate law, immigration, conveyancing and other practice areas, has always been an accepted and ethical aspect of legal representation provided that the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product. Therefore, the determination that title abstracting may be conducted by non-

attorneys does not support the District Court's conclusion.

D. The Related Activities Undertaken To Evaluate
And Transfer A Legal Interest In Real Property
Require The Professional Judgment Of An
Attorney And Are The Practice Of Law.

As noted above, after the District Court could find no SJC precedent listing the various activities that make up "conveyancing," it failed to undertake any analysis of the activities described in the O'Donnell Affidavit. Nor did the District Court arrive at its generalized conclusion that an attorney must have "some involvement" in "preparing for and conducting the closing" through any reasoned judgment. Instead, the District Court simply based its decision on its conclusion that existing SJC precedent seemed to create an "expectation" of such involvement. An analysis of the activities described in the O'Donnell Affidavit, as set forth below, demonstrates that each constitutes the practice of law.

1. The Examination Of The Title To The Property
Being Sold Requires The Professional Judgment
Of A Lawyer And Is The Practice Of Law.

As noted above, the seller is typically obligated under his contract to deliver "good and clear record and marketable" title to the buyer. This is not perfect title. Under Massachusetts law, "good and clear record title" is "a title which on the record itself can be again sold as free from obvious defects, and substantial doubts." O'Meara v. Gleason, 246 Mass. 136, 138, 140

N.E. 426 (1923). It is title that is not "subject to adverse claims which are of such a nature as may reasonably be expected to expose the purchaser to controversy to maintain his title, or rights incident to it." Jeffries v. Jeffries, 117 Mass. 184, 187 (1875). As the Massachusetts Appeals Court aptly observed, a person buying title to real property is not required "to buy a law suit." Smith v. Albion, 17 Mass. App. Ct. 712, 716, 461 N.E.2d 1237 (1984).

The evaluation necessary to determine whether the seller's title is subject to "obvious defects," "substantial doubt," or "adverse claims" that "may reasonably be expected to expose the purchaser to controversy" -- in short, whether the purchaser is likely "buying a law suit"-- requires both substantive knowledge of *in rem* state and federal law and the professional judgment of a person familiar with general legal principles. See Opinion of the Justices, 289 Mass. at 615 (practice of law includes the examination of real estate records in order to assess the legal validity of those documents and of title); Colonial Title & Escrow, Inc., 13 Mass.L.Rptr. 633, 2001 WL 669280 at *8. See also Beach Abstract & Guaranty Co. v. Bar Ass'n, 230 Ark. 494, 501, 326 S.W.2d 900 (1959) ("title examination and curative work, when done for another, constitutes the practice of law in its strictest sense and has long been considered as such").

The potential title issues that may arise in the course of a

title examination cannot be listed in any comprehensive way. They include:

- Adverse Possession. Under G.L. c. 260, § 21, adverse rights of others may affect the title resulting from easements over the property.
- Attachments. The assessment of the validity of attachments placed on the property requires an understanding of G.L. c. 233, §§ 1, et seq., and the case law construing those statutory provisions.
- Condominiums. Condominiums are statutory creations and the Massachusetts condominium law, G.L. c. 183A, §§ 1, et seq., includes many statutory requirements that could affect the validity of the master deed, G.L. c. 183A, § 8, the unit deed, G.L. c. 183A, § 9, and any appurtenant rights.
- Descriptions. Massachusetts law requires that the description of the property must identify the property with sufficient particularity. See McHale v. Trewargy, 325 Mass. 381, 90 N.E.2d 908 (1950) (conveyance is void if it does not describe property with sufficient particularity).
- Discharge of Mortgage. The legal requirements governing the proper discharge of a mortgage are set forth in G.L. c. 183, §§ 54, 55.
- Divorce. Under Massachusetts law, if the grantor is divorced or involved in a divorce action, the property may

be subject to an attachment pursuant to G.L. c. 208, § 13 or an equitable lien existing pursuant to G.L. c. 184, § 15. If the conveyance is part of an alimony judgment, there must be full compliance with the provisions of G.L. c. 208, § 34A.

- Easements. Easements can be created by express grant, G.L. c. 183, § 13, by implication, by estoppel, by necessity, G.L. c. 185, § 53, by statute G.L. c. 187, § 5, or by prescription, G.L. c. 187, § 2.

- Executions. The validity of a title resulting from a sheriff's sale depends on strict compliance with relevant statutes, G.L. c. 236, §§ 1, et seq.

- Homestead. As a purely statutory freehold estate, a homestead must be claimed and terminated in the manner provided by G.L. c. 188, §§ 1, et seq.

- Leases. A title examination may disclose that the property is encumbered by a lease if it is recorded and satisfies the statutory requirements. G.L. c. 183, § 4 (unregistered land); G.L. c. 185, § 71 (registered land).

- Lis Pendens. Memoranda of lis pendens recorded pursuant to G.L. c. 184, § 15 encumber the property and the procedures for terminating them is specified in G.L. c. 184, § 7.

- Mechanics' Lien. Mechanics' liens that are created under G.L. c. 254, § 1 (lien for personal labor) or G.L. c. 254, §§ 2-4 (for labor or materials furnished under a

written contract). The statutes must be strictly complied with in order to create and perfect a lien. Cook Borden & Co. v. Commonwealth, 293 Mass. 174, 199 N.E. 551 (1936). The procedures for dissolving a lien are also statutory. G.L. c. 254, §§ 10, 12, 15.

- Mortgage Foreclosures. Massachusetts law provides for foreclosure by action, G.L. c. 244, §§ 1-10, by bill in equity, G.L. c. 185, § 1(k), by entry and continuation of possession for three years, G.L. c. 244, §§ 1, 2, or by sale under the power of sale in a mortgage, G.L. c. 244, §§ 11, 17. A recent decision of the Massachusetts Land Court places many recent foreclosures in doubt. U.S. Bank Nat. Ass'n v. Ibanez, slip op., C.A. 08 MISC 384283(KCL) (Mass. Land Ct. Oct. 14, 2009).

- Power of Attorney. In Massachusetts, property can be conveyed by a durable power of attorney provided it satisfies the requirements of G.L. c. 201B, §§ 1, et seq. and there is an affidavit executed in accordance with G.L. c. 201B, § 5.

- Trusts. Where the property being conveyed is held by a testamentary trust, an inter vivos trust, a business trust, a nominee trust, a spendthrift trust, or a charitable trust, the ability to sell the property depends on the powers contained in the trust instrument, DeLongchamps v. Duquette,

24 Mass. App. Ct. 976, 512 N.E.2d 1146 (1987), and how those powers are construed.

These issues, and many others, can potentially arise in any real estate transaction. The "appropriate procedures" for considering all of the matters disclosed in a title examination and "passing on a title" have evolved through "decisional law and commentary." Fall River Sav. Bank, 18 Mass. App. Ct. at 83.

Although many of the procedures are standardized, their application to a particular property requires the judgment of a person trained in the law. For instance, even determining the appropriate period for a title search "involves an element of judgment." Cornwall v. Forger, 27 Mass. App. Ct. 336, 342 n.6, 538 N.E.2d 45 (1989).

To the extent that the conveyancing attorney is involved in drafting of documents to resolve a title issue, such activities clearly constitute the practice of law. E.g., In re Shoe Mfrs. Protective Ass'n, 295 Mass. at 372 (corporation which completes legal documents for others engages in the unauthorized practice of law). However, even where the title defect is purportedly cured by another, the conveyancing attorney must still review the resolution of the title issue to ensure that it is satisfactory under the law. Just as a substantive knowledge of Massachusetts law is required to identify the defect, such knowledge is also required to resolve it or to validate the resolution undertaken

by others.

2. The Preparation Of A Deed Requires The Professional Judgment Of A Lawyer And Is The Practice Of Law.

A deed is the legal instrument by which the buyer's rights in the property are established. Drafting a deed requires knowledge of and facility with a wide array of statutes and the common law specifying the necessary elements of a deed, the acceptable words of grant, the descriptions, the various types of deeds (warranty, quitclaim, mortgage trustee deed), the statutory covenants (G.L. c. 183, §§ 16, 19), all of which are prescribed by statute or common law. There is little question that the drafting of a deed is the practice of law. In re Shoe Mfrs. Protective Ass'n, Inc., 295 Mass. at 372 (practice of drafting documents in which legal rights are "created, modified, surrendered or secured" is the practice of law); Opinion of the Justices, 289 Mass. at 615 (preparation of deeds falls outside of the practice of law only "when not conducted as an occupation or yielding substantial income"). See also Eisel v. Midwest Bank-Centre, 230 S.W.3d 335, 337 n.3 (Mo. 2007) ("There can be no question that the preparation of the deed of trust and the promissory note constitutes the practice of law"); Ohio State Bar Assn. v. Newburn, 119 Ohio St.3d 96, 97, 892 N.E.2d 431 (2008) ("practice of law embraces the preparation of legal documents on another's behalf, including deeds which convey real property").

3. The Activities Undertaken At The Settlement Of The Transaction Require The Professional Judgment Of A Lawyer And Are The Practice Of Law.

The settlement of the real estate transaction is the time at which the parties exchange the consideration required by their agreements and execute and deliver numerous legal documents required by state and federal law. The activities undertaken by the conveyancing attorney at the settlement require the professional judgment of an attorney with substantive knowledge of *in rem* state and federal law.

In order to pass on the title documents (deed and mortgage), the conveyancing attorney must be familiar with G.L. c. 183, §§ 1, et seq. and the decisions construing these statutory provisions. The requisite elements of the deed and mortgage (e.g., the words of grant, the consideration, the description of the property, the form of the acknowledgment), as well as the validity of these elements, are governed by common law and numerous statutory provisions. An instrument that does not comply with one of these requirements imposed by Massachusetts law may be invalidated. E.g., In re Giroux, slip op., C.A. No. 08-14708-JNF, 2009 WL 1458173 (Bkrtcy. D. Mass. May 21, 2009) (voiding mortgage that contained materially defective acknowledgment not in compliance with G.L. c. 183, § 29).

In order to be able to ensure further that all the requirements specified in the mortgage commitment have been

satisfied and all contractual obligations met, the conveyancing attorney must obviously be able to make such judgments with respect to these legal documents. Siegal v. Shaw, 337 Mass. 170, 172, 148 N.E.2d 393 (1958) (tendered deed must conform in all particulars to the terms of the parties' agreement). See also Colonial Title & Escrow, Inc., 13 Mass.L.Rptr. 633, 2001 WL 669280 at *8 ("[e]valuating and ensuring that parties to a real estate transaction have complied with their agreements" is the practice of law). This activity clearly requires an understanding of the law and legal principles and can only be performed by one trained in the law.

Similarly, there can be little doubt that to answer the parties' questions at the settlement regarding the title documents, the loan documents, the disbursement of the funds, the mortgage obligations, and other matters regarding the transaction, requires a knowledge and understanding of the law. See Private Lending & Purchasing, Inc. v. First Am. Title Ins. Co., 54 Mass. App. Ct. 532, 537 n.9, 766 N.E.2d 532 (2002) ("Explanation of the legal effect of liens or encumbrances [to a non-client] may fall within the practice of law, to be conducted by a lawyer rather than the insurer"). See Colonial Title & Escrow, Inc., 13 Mass.L.Rptr. 633, 2001 WL 669280 at *8 ("[e]xplaining at the closing any documents relating to the interest in the real estate being created, transferred or terminated and relating to

the agreement of the parties" is the practice of law).

In order to be in a position to answer the parties' questions correctly, the conveyancing attorney must be privy to the title examination and the work to validate that the seller has "good and clear record and marketable" title to the real property. However, the attorney retained by NREIS to attend the settlement has no knowledge of the title examination. Although he may be able to determine if the title documents satisfy the requirements of form imposed by Massachusetts law, he can do little more. Without knowledge of the title examination, the attorney is unable to answer the most basic questions regarding the property - such as whether the deed presented by the seller at the closing is valid.

4. The Activities Undertaken Immediately Prior To Recording The Title Documents Which Require The Professional Judgment Of A Lawyer Are The Practice Of Law.

The final step in conveyancing, a final run-down of the title at the registry of deeds to ensure that the status of the seller's title has not changed and recording the title documents, also requires the professional judgment of an attorney. Although limited in time, the title examination is otherwise the same as that conducted before the settlement and necessitates the same knowledge and understanding of the law. Lee v. Dattilo, 26 Mass. App. Ct. 185, 189, 525 N.E.2d 679 (1988) ("Unless the buyer is

given an opportunity to examine all the papers on record at a time when the deed from the seller can be recorded, the buyer cannot ascertain that there is a clear record title"). See also Doe Law Firm v. Richardson, 371 S.C. 14, 18-19, 636 S.E.2d 866 (2006) ("recording of documents is the 'final phase' of the real estate loan process and must be done under the supervision of an attorney").

5. The Fact That These Conveyancing Activities Have Historically Been Conducted By Attorneys Supports The Determination That They Are The Practice Of Law.

It is not insignificant that conveyancing in Massachusetts has traditionally been conducted by attorneys. One of the practical tests that courts often use to decide whether an activity is the practice of law is to determine whether it ordinarily has been performed by lawyers. The fact that the public has historically entrusted an activity to a lawyer is an indication that the activity requires the knowledge and skill of a person trained in the law. Opinion of the Justices, 289 Mass. at 613-14 ("customary functions of attorney" constitute practice of law); Loeb, 315 Mass. at 186 ("The actual practices of the community have an important bearing on the scope of the practice of law").

II. THE ISSUANCE OF TITLE INSURANCE IS THE PRACTICE OF LAW BECAUSE IT IS PREMISED ON A TITLE EXAMINATION TO DETERMINE THE STATUS OF TITLE.

A. The Title Insurance Policies Issued By NREIS Are Premised On An Examination Of Title That Can Only Be Conducted By An Attorney.

Title insurance is now a modern adjunct to most mortgage loan transactions. 28 A. Eno, et al., Mass. Practice: Real Estate Law § 30.1 at 789 (2004). It provides "protection against defects in, or liens or encumbrances on, title." Somerset Sav. Bank v. Chicago Tit. Ins. Co., 420 Mass. 422, 428, 649 N.E.2d 1123 (1995). Unlike other forms of insurance that are based on actuarial tables, a title insurance policy is based on a thorough title examination to identify what, if any, defects, liens or encumbrances exist as of the date that the policy will issue. See Colonial Title & Escrow, Inc., 13 Mass. L. Rptr. 633, 2001 WL 669280 at *4 (title examination for the issuance of the title insurance policy is the same as conveyancing attorney's certification of title). See also Caryl A. Yzenbaard, Residential Real Estate Transactions 5:17 at 182 (1991) (a title insurance policy "indicates an opinion of the title company regarding the status of the title and if that opinion is wrong, the company will pay").

If the title examination has disclosed a defect, it is corrected or it becomes the basis of an exception from coverage written into the policy. Therefore, if it is done correctly, the

title examination will have eliminated the grounds of any potential loss. Not surprisingly, because of the importance of the title examination, most of the cost of the premium is used to pay its costs with a relatively small fraction of the premium being used to pay actual claims. Joyce D. Palomar, Bank Control of Title Insurance Companies: Perils to the Public that Bank Regulators have Ignored, 44 Sw. L.J. 905, 930 (Fall 1990) ("title examination is the main focus of title insurance, with as much as ninety percent of the title insurance premium paying for its cost").

As discussed above, a title examination of the status of title to residential property constitutes the practice of law. See supra pages 19 - 21. Consequently, courts have also specifically held that the activities of a title agent, which largely consist of undertaking the title examination to the property being insured, constitute the practice of law. E.g., Colonial Title & Escrow, Inc., supra, 13 Mass. L. Rptr. 633, 2001 WL 669280 at *7 (issuing title certification or policy of title insurance is the practice of law); United States v. City of Flint, 346 F. Supp. 1282, 1286 (E.D. Mich. 1972) (title insurance is "predicated upon careful examination of the muniments of title, an exhaustive study of the applicable law and the exercise of expert contract draftsmanship ... the existence of title defects will depend upon legal doctrines and judicial interpre-

tations of various applicable statutes"); Beach Abstract & Guaranty Co., 230 Ark. at 501, 326 S.W.2d at 903 (title insurance agent who reviewed title abstract to determine state of title was practicing law). Consequently, other than the title insurer itself, only an attorney may issue a title insurance policy that insures the title to real estate in Massachusetts.

Among its other services, NREIS sells title insurance policies to lenders and property owners. NREIS's title agency agreements provide that NREIS's issuance of a title insurance policy is to be based on a title examination. NREIS conceded that it is not competent to perform the title examination required to issue a title insurance policy and it does not conduct such examinations. NREIS mistakenly believed that Connolly Title was a law firm and therefore able to perform such title examinations. NREIS's policies were prepared based entirely on an abstract provided by Connolly Title. Given NREIS's acknowledgment that it is not competent to undertake the legal work necessary to determine the status of title that the policies insures, the Court must find that NREIS cannot engage in such activities indirectly through its subcontractor.

B. The District Court's Conclusion That Issuing Title Insurance Was Not The Practice Of Law Was Based On A Misreading Of Rule 5.7(b) Of The Massachusetts Rules Of Professional Conduct.

In its Memorandum, the District Court held that the issuance of a title insurance policy was not the practice of law. The District Court did not reach this conclusion by analyzing any of the activities involved in issuing title insurance. Contra In re Shoe Mfrs. Protective Ass'n, 295 Mass. at 372, 3 N.E.2d 746 (practice of law cases "must be decided upon [their] own particular facts"). Instead, its conclusion was based on a misreading of Rule 5.7 of the Massachusetts Rules of Professional Conduct.

Rule 5.7 identifies the circumstances in which the Rules of Professional Conduct do not apply to a lawyer who is providing "law-related services." The most important attribute of a "law-related service" is that it must be a service that is "not prohibited as unauthorized practice of law when provided by a nonlawyer." Mass. R. Prof. C. 5.7(b). Therefore, Rule 5.7(b) clearly anticipates that when the Rule is being applied to a lawyer there will be an evaluation as to whether the services at issue are or are not the practice of law. In this case, as described above, the issuance of a title insurance policy on behalf of a title insurer is the practice of law. Therefore, it cannot be a "law-related service" under Rule 5.7.

The District Court made no such evaluation. Instead, the District Court relied on a statement in Comment 9 that listed

"title insurance" as an example of a "law-related service." The District Court mistakenly read the Comment as immunizing any activity related to "title insurance" and eliminating the Rule 5.7 requirement that the activity not be the unauthorized practice of law. It is plain that activities that are "prohibited as unauthorized practice of law when provided by a non-lawyer" are not lawful simply when they are provided in connection with title insurance. The District Court's conclusion was erroneous and must be reversed.

III. SPECIFIC ACTIVITIES UNDERTAKEN BY NREIS CONSTITUTE THE PRACTICE OF LAW OR ARE IN VIOLATION OF MASSACHUSETTS LAW.

As noted above, the summary judgment motions as framed by NREIS did not focus on NREIS's activities. Notwithstanding the District Court's resolution of the conveyancing issue, there are also clear unlawful practices and violations of statutory law that the District Court failed to address.

A. NREIS Is Engaged In The Unauthorized Practice Of Law When It Provides Deeds That Have Been Drafted By A Las Vegas Company.

As described above, supra 39-40, there is little question that drafting a deed constitutes the practice of law. NREIS admitted that it drafts deeds by subcontracting this work to a Las Vegas company. This is a clear instance of the unauthorized practice of law by NREIS which was entirely ignored by the District Court. This Court should remand the case back to the

District Court and direct that it enjoin such unlawful practices.

B. NREIS's Failure To Provide A Certification Of Title Is A Violation Of Massachusetts Law.

As noted above, Massachusetts law requires that the mortgagor receive a certification of title based on a 50-year title examination that, at the time the mortgage is recorded, the mortgagor holds "good and sufficient record title to the mortgaged premises free from all encumbrances." G.L. c. 93, § 70. In violation of Massachusetts law, NREIS does not provide the required certification. Although, REBA pointed this violation out to the District Court, it too was ignored. This Court should remand the case back to the District Court and direct that it enjoin such unlawful practices.

C. NREIS Violates G.L. c. 183, § 63B, By Retaining The Mortgage Proceeds In All The Real Estate Transactions It Completes.

Massachusetts law requires that the mortgage loan proceeds be held by "the mortgagor, the mortgagor's attorney or the mortgagee's attorney" before the deed or the mortgage may be recorded. G.L. c. 183, § 63B. In clear violation of this statute, NREIS retains the mortgage proceeds and disburses them itself. The District Court failed to address this violation of law. This Court should remand the case back to the District Court and direct that NREIS comply with Massachusetts law.

D. NREIS Is Engaged In The Unauthorized Practice Of Law By Hiring Attorneys To Represent Lenders At The Settlement Of The Transactions.

Even if this Court affirms the District Court's Judgment, it must still find that NREIS is engaged in the unauthorized practice of law. NREIS provides legal services to its lender clients by hiring Massachusetts attorneys to attend the settlement. This is obviously the practice of law. The fact that NREIS is providing these services through licensed attorneys is immaterial. NREIS clearly could not sell litigation services by hiring attorneys to provide such services. Likewise, it cannot provide legal services to its lender clients by subcontracting that work out to attorneys.

Since NREIS cannot practice law directly, "it cannot do so indirectly by employing competent lawyers to practice for it, since that would be an evasion which the law will not tolerate." State Bar Ass'n v. Connecticut Bank & Trust Co., 140 A.2d 863, 870 (Conn. 1958). See also People by Lefkowitz v. Lawrence Peska Assoc., Inc., 90 Misc.2d 59, 61-62, 393 N.Y.S.2d 650 (1977) (corporation held to be engaged in the unauthorized practice of law where it received a fee for legal services by referring patent applications to attorneys); In re Otterness, 181 Minn. 254, 257, 232 N.W. 318, 319 (1930) ("neither a corporation nor a layman not admitted to practice can practice law nor indirectly practice law by hiring a licensed attorney to practice law for

others for the benefit or profit of such hirer"); Doughty v. Grills, 37 Tenn. App. 63, 94, 260 S.W.2d 379, 392 (1952) ("corporation cannot legally practice law, either directly or indirectly, by employing competent lawyers to practice for it"); West Virginia State Bar v. Earley, 144 W.Va. 504, 527, 109 S.E.2d 420 (1959) ("corporation or other lay agency can not practice law or hire lawyers to practice law for it"). Although this unlawful practice was pointed out to the District Court, it too was ignored.

E. In Managing Activities That Establish Legal Rights In Real Property, NREIS Is Engaged In The Practice Of Law.

In Massachusetts, managing the processes by which legal rights are established - which is exactly what NREIS claims it does - is the practice of law. The SJC has observed that while it might be difficult to articulate a comprehensive definition of the practice of law, "at least it may be said that in general the practice of directing and managing ... the establishment of the legal rights of others, ... constitutes the practice of law." In re Shoe Mfrs. Protective Ass'n, 295 Mass. at 372. See also Toledo Bar Ass'n v. Joelson, 114 Ohio St.3d 425, 426, 872 N.E.2d 1207 (2007) ("unauthorized practice occurs when a layperson renders legal services for another person or corporate entity by attempting to manage legal actions and proceedings").

Conveyancing, however it is defined, indisputably results in

the establishment of legal rights in real estate on behalf of the borrower and the lender. Under Massachusetts law, the establishment of such legal rights cannot be "managed" by a non-attorney, even where the underlying activity is performed by an attorney. The attorney-client relationship is necessarily direct, confidential and personal and cannot be permitted to exist through intermediaries. In re Shoe Mfrs. Protective Ass'n, 295 Mass. at 373 (noting "direct personal confidence and responsibility which ought to exist between attorney at law and client"). Consequently, this Court should reverse the District Court's Judgment and hold that NREIS is engaged in the practice of law.

IV. LITIGANT DOES NOT VIOLATE THE CONSTITUTION BY ADVOCATING A POSITION WHICH IS REJECTED BY THE DISTRICT COURT.

A. The Court Reviews The Dormant Commerce Clause Issues Under A De Novo Standard.

The District Court's summary judgment decision finding a violation of the dormant Commerce Clause is reviewed under a *de novo* standard. Family Winemakers of California v. Jenkins, ___ F.3d ___, 2010 WL 118387 at *2 (1st Cir. 2010).

B. Once The District Court Found That Massachusetts Law Did Not Restrict NREIS's Commercial Activities, The Dormant Commerce Clause Issue Became Moot.

In its Counterclaim, NREIS had asserted that its constitutional rights would be violated by a judicial decision prohibiting it from providing conveyancing services in Massachusetts.

Significantly, NREIS did not contend that any existing Massachusetts statute or judicial decision interfered in any way with its commercial activities.⁵ Instead, NREIS stated that if the District Court "adopted as law" the arguments asserted by REBA, that law would violate the dormant Commerce Clause. [RA.356].

Once the District Court determined that state law did not prohibit NREIS's commercial activities, the threat to NREIS's constitutional rights evaporated and the Counterclaim should have been dismissed. Instead, the District Court stated that, because the SJC had provided little "guidance" on the practice of law issue, it would reach the dormant Commerce Clause issue. However, where NREIS's activities are not burdened, the District Court's decision to resolve the constitutional issue was unnecessary and inconsistent with numerous Supreme Court opinions. E.g., Washington State Grange v. Washington State Republican Party, ___ U.S. ___, 128 S.Ct. 1184, 1191, 170 L.Ed.2d 151 (2008) ("fundamental principle of judicial restraint" is that courts should not "anticipate a question of constitutional law in advance of the necessity of deciding it").

⁵ NREIS conceded that it is not claiming that the Massachusetts unauthorized practice of law statutes, G.L. c. 221, §§ 46A, et seq., are unconstitutional. [RA.356 n.10]

C. The District Court Erred By Subjecting REBA's Arguments To A Constitutional Analysis.

As noted above, the premise of NREIS's Counterclaim was that any Massachusetts law restricting its commercial activities violated the dormant Commerce Clause under the two-tier test approved by the Supreme Court. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578 (1986). Ordinarily, the test would be applied to the law that allegedly restricted interstate commerce. In this case, the District Court did not find any restriction on NREIS's activities, so the test could not be applied to a state law. Instead, the District Court purported to subject REBA's *arguments* -- which the District Court had rejected -- to a constitutional analysis. The District Court's conclusion that the test could be applied to a litigant's arguments, which are not asserted in defense of an unconstitutional statute, is erroneous and must be reversed.

Under the first tier test, a "state regulation that discriminates against interstate commerce on its face, in purpose, or in effect is highly suspect." Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28, 32 (1st Cir. 2007). Such a law "will be sustained only when it promotes a legitimate state interest that cannot be achieved through any reasonable nondiscriminatory alternative." Id. Under the second tier test, "[l]aws that regulate evenhandedly and only incidentally burden commerce are subjected to less searching scrutiny under a balancing test."

Id. Under this balancing test, a challenged law will be validated unless it burdens commerce in a way that is 'clearly excessive in relation to the putative local benefits' to be derived therefrom." Id.

Neither test cannot be applied in any meaningful way to arguments asserted by litigants in federal court. An argument does not "regulate evenhandedly" or otherwise. An argument provides no "local benefits" that can be measured or weighed against burdens imposed on interstate commerce. Though an argument may sway a judge, it has no impact, "discriminatory" or otherwise, on interstate commerce. Each test can only be applied to a statute, regulation, decree, local ordinance, or other legislative, executive or judicial act or practice in which the authority of the state has the capacity to affect commercial activities. In contrast, an argument made by a private party to a federal court -- especially an argument that the federal court declines to adopt -- has no such capacity. Where an argument presented to a federal court is not by itself, and cannot be, an element of "economic protectionism," it cannot violate the dormant Commerce Clause.

D. The Absence Of A State Law That Prohibits Any Of NREIS's Commercial Activities Plainly Distinguishes This Case From National Revenue Corp.

The District Court stated that its holding was justified by Nat'l Revenue Corp. v. Violet, 807 F.2d 285 (1st Cir. 1986). That

case is easily distinguishable from the instant case. In National Revenue Corp., the Attorney General defended a statute that impinged on National Revenue Corp.'s commercial activities. The First Circuit held that the state statute violated the dormant Commerce Clause. It did not hold that the arguments asserted by the Attorney General were unconstitutional.

There is no statute in this case alleged to be unconstitutional. There is no regulation, decree, local ordinance, or other legislative, executive or judicial act that impinges or threatens to impinge on NREIS's constitutional rights. Although NREIS contends that G.L c. 221, § 46A or § 46B, or both⁶ have been "applied" by REBA in an unconstitutional manner, the only way that REBA has utilized G.L c. 221, § 46B is to access the courts and petition the state judiciary for relief. The exercise of this constitutional right is not itself unconstitutional and the District Court's Judgment must be reversed.

⁶ NREIS has not clearly articulated which statute it believes has been "applied" in an unconstitutional manner or the nature of the unconstitutional "application." NREIS has certainly not identified any facts that demonstrate a burden on interstate commerce arising from the manner in which either statute has been "applied" by REBA in federal court.

V. REBA'S ACT OF PETITIONING THE MASSACHUSETTS SUPERIOR COURT IN ACCORDANCE WITH G.L. c. 221, § 46B TO ENJOIN ACTIVITIES IT CONTENDS ARE THE UNAUTHORIZED PRACTICE OF LAW DOES NOT CONSTITUTE "STATE ACTION."

A. The Filing And Prosecution Of State Court Litigation By A Private Party Does Not Qualify As "State Action."

It is axiomatic that a "Section 1983 claim does not lie absent state action." Alexis v. McDonald's Rest., 67 F.3d 341, 351 (1st Cir. 1995). This Court has stated that a § 1983 claim can be made against a private party, like REBA, only when its "conduct can be deemed 'fairly attributable to the State.'" Destek Group, Inc. v. State of New Hampshire Pub. Utils. Comm'n, 318 F.3d 32, 40 (1st Cir. 2003). REBA cannot be liable under § 1983 because neither REBA's petition to the state court nor the "positions" REBA asserted in this litigation in support of the petition are conduct "fairly attributable to the State."

This Court should reject NREIS's contention that REBA's filing of its complaint is "fairly attributable to the State" simply because REBA has standing pursuant to G.L. c. 221, § 46B. The Supreme Court has held that an action taken by a private party does not become "state action" merely because the action is authorized by a state statute. Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (conduct by private party pursuant to statute, without more, is not sufficient to characterize the conduct as "state action").

B. REBA's Act Of Petitioning The State Court Pursuant To G.L. c. 221, § 46B Is Not "State Action" Because Petitioning The Courts Is Not "Traditionally The Exclusive Prerogative Of The State."

NREIS has suggested that REBA was engaged in "state action" because the statute which authorizes REBA to act in the public interest amounts to a delegation of a traditional "public function." However, to prevail on this theory, NREIS "must show more than the mere performance of a public function by a private entity." Perkins v. Londonderry Basketball Club, 196 F.3d 13, 18-19 (1st Cir. 1999). See also Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (merely because "a private entity performs a function which serves the public does not make its acts state actions").

To demonstrate that REBA is fairly characterized as a state actor for purposes of a § 1983 claim, NREIS must establish that REBA performed a public function that has been "traditionally the exclusive prerogative of the State." Rendell-Baker, 457 U.S. at 842 (education is a public function, but is not the exclusive prerogative of the state) (emphasis in original). While many functions have been traditionally performed by governments, very few have been the "exclusive prerogative of the State." Estades-Negróni v. CPC Hosp. San Juan Capestrano, 412 F.3d 1, 8 n.16 (1st Cir. 2005) ("few activities have been found to satisfy this demanding standard").

Petitioning the state court is not one of the "few" activities that are "the exclusive prerogative of the State." While state actors do file complaints seeking judicial relief, it is not an activity exclusive to the government. In fact, accessing the courts is a "fundamental constitutional right" that all persons enjoy. Bounds v. Smith, 430 U.S. 817 (1979). "[P]etitioning of the government is a quintessential private function." Single Moms, Inc. v. Montana Power Co., 331 F.3d 743, 748 (9th Cir. 2003).

Moreover, while NREIS could conceivably argue that regulating the practice of law is a "traditionally exclusive public function," REBA clearly did not usurp that function simply by bringing NREIS's activities to the state court's attention. E.g., Brown v. Newberger, 291 F.3d 89, 93 (1st Cir. 2002) (social worker who filed report of suspected child sexual abuse pursuant to state statute was not a state actor subject to § 1983 liability because her report merely signaled need for the state agency to investigate and decide for itself whether problem existed). Reporting instances of the unauthorized practice of law is not an exclusive public function because private parties have been authorized to petition the courts since 1935 when G.L. c. 221, § 46B was enacted. See St. 1935, c. 346, § 2.

C. A Private Party's Efforts To Induce A Court To Recognize A Particular "Position" Or "Interpretation" Of State Law That Arguably Violates The Constitution Does Not Qualify As "State Action."

Nor can NREIS contend that REBA was wrongfully seeking to induce the state court to create a new legal precedent that (NREIS claimed) would violate its constitutional rights. This Court has strongly rejected such arguments as a basis for "state action," and has held that, even when the private party's arguments are accepted by the state officials, the private party does not become a state actor liable under § 1983. Tomaiolo v. Mallinoff, 281 F.3d 1 (1st Cir. 2002).

VI. A REQUIREMENT THAT ONLY ATTORNEYS PERFORM THOSE CONVEYANCING ACTIVITIES DETERMINED TO BE THE PRACTICE OF LAW WOULD NOT UNLAWFULLY INTERFERE WITH INTERSTATE COMMERCE.

If this Court were to hold that some or all of the activities undertaken to convey real estate in Massachusetts constitute the practice of law and may be conducted only by attorneys, that holding would not violate the dormant Commerce Clause.⁷

⁷ It is clear that the District Court did not subject REBA's arguments to a constitutional analysis. Instead of analyzing REBA's arguments, the District Court analyzed the exact opposite of those arguments and assumed for the purposes of its analysis that conveyancing was not the practice of law. E.g., Court's Memorandum at RA.896-97 ("by including activities that, by themselves, do not constitute the practice of law," REBA's contentions would impermissibly burden interstate commerce).

A. Prohibiting Non-Attorneys From Conveyancing, Whether They Reside Inside Or Outside The Commonwealth, Is Not A Per Se Violation Of The Dormant Commerce Clause.

Under the first of the two-tier analysis approved by the Supreme Court, it is plain that a prohibition against lay-persons conducting conveyances in Massachusetts does not discriminate "on its face, in purpose, or in effect" against interstate commerce. The prohibition applies even-handedly against all non-attorneys, whether they reside in Massachusetts or they reside out-of-state. In this case, though the two NREIS Defendants are Pennsylvanian entities, the prohibition applies to them regardless of where they reside. See Davrod Corp. v. Coates, 971 F.2d 778, 788 (1st Cir. 1992) (state law imposing a 90-foot length restriction on fishing vessels "is non-discriminatory, because it applies equally to both intrastate and interstate [enterprises]"); Tolchin v. Supreme Court of the State of N.J., 111 F.3d 1099, 1108 (3d Cir. 1997) (requirement that all attorneys, in-state and out-of-state, must maintain bona fide office in New Jersey in order to practice law there, did not discriminate against interstate commerce). Even if these entities resided in Massachusetts, they would not be permitted to practice law here. See, e.g., Colonial Title & Escrow, Inc., 13 Mass. L. Rptr. 633, 2001 WL 669280 (injunction issued against Massachusetts corporation and against Rhode Island corporation precluding defendants from conveyancing).

Under the dormant Commerce Clause analysis articulated by the Supreme Court, the burden of establishing discrimination rests with NREIS. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). NREIS failed carry that burden. It did not demonstrated that the prohibition against non-attorneys conducting conveyances in Massachusetts has any impact on interstate commerce. All NREIS could show was that Massachusetts's practice of law restrictions would preclude it from practicing law in Massachusetts. However, the fact that a state law restriction "may have 'devastating economic consequences' on a particular interstate firm is not sufficient to rise to a Commerce Clause burden." Pharmaceutical Research and Mfrs. of America v. Concannon, 249 F.3d 66, 84 (1st Cir. 2001), quoting Instructional Systems, Inc. v. Computer Curriculum Corp., 35 F.3d 813, 827 (3d Cir. 1994). Though NREIS may have demonstrated that an injunction may have an impact on it,⁸ NREIS has identified no burden whatsoever on interstate commerce.

While NREIS has not identified any burden on interstate commerce, the Supreme Court has observed the States' interest in regulating the practice of law is "substantial" and "compelling."

⁸ It is debatable whether NREIS will actually suffer any adverse impact from an injunction in this case. As described above, neither NREIS nor any other similar entity will be precluded from providing services, that NREIS describes as "non-legal administrative tasks," that are integral to a conveyance. NREIS can, and presumably will, continue to provide those services to the attorneys who are responsible for the conveyance.

Fla. Bar v. Went For It, Inc., 515 U.S. 618, 625 (1995) (citations omitted). The Supreme Court has held that "the States have a compelling interest in the practice of professions" and an "especially great" interest in the practice of law. Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975). See also In re Lyon, 301 Mass. 30, 34, 16 N.E.2d 74 (1938) ("The regulation in the public interest of occupations and professions such as those of law, medicine and others which, if uncontrolled, may develop methods and practices inimical to the public welfare, is historically and logically, and we think also legally, a matter primarily of State concern"); Strigler v. Board of Bar Examiners, 448 Mass. 1027, 1030, 864 N.E.2d 8 (2007) ("authority to regulate the practice of law has been left to the States '[s]ince the founding of the Republic'").

Beyond Massachusetts's "substantial" and "compelling" interest in regulating the practice of law, there is a strong public policy interest in ensuring that advice regarding legal matters is provided only by persons admitted to practice law by the SJC. See also Loeb, 315 Mass. at 180 ("The jurisdiction for excluding from the practice of law persons not admitted to the bar is to be found, not in the protection of the bar from competition, but in the protection of the public from being advised and represented in legal matters by incompetent and unreliable persons, over whom the judicial department could exercise little

control"). Moreover, that public policy interest is doubly strong in conveyancing matters where there are numerous parties (the buyer, the seller, and the lender) who rely on the person chosen by the lender to properly convey the various property rights in the real property.

B. NREIS Has Failed To Demonstrate That Any Burden On Interstate Commerce Resulting From A Prohibition On The Practice Of Law By Non-Attorneys Clearly Exceeds The Local Benefits.

The Supreme Court has instructed that if the State action regulates evenhandedly between in-state and out-of-state interests, as the prohibition on non-attorneys does in this case, then the Court's evaluation moves to the balancing test outlined in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). In the balancing test, the Court must examine "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." Brown-Forman Distillers Corp., 476 U.S. at 579.

Before the District Court, NREIS omitted any examination of the burden on interstate commerce, other than to allege that there is "an extreme and undue burden on NREIS." [RA.365] Instead, NREIS argued only that there is no local benefit from precluding non-attorneys from conducting conveyances, and that NREIS's activities pose no threat to consumers or to the land recording system. NREIS submitted no evidence to support either

of these claims. Moreover, with respect to the harm posed by NREIS's activities, a showing of harm is not even necessary to enjoin NREIS from engaging in the practice of law. E.g., In re Margow, 77 N.J. 316, 325 (1978) ("the amateur at law is as dangerous to the community as an amateur surgeon would be").

VII. THERE WAS NO EVIDENCE TO SUPPORT THE DISTRICT COURT'S FINDING THAT IT WAS "HIGHLY UNLIKELY THAT MASSACHUSETTS LAWYERS COULD PROVIDE THE SAME SERVICES AT THE SAME EXPENSE TO THE CUSTOMER AS NREIS PROVIDES."

As noted above, NREIS presented no evidence that prohibiting it from conducting conveyances would have a substantial effect on interstate commerce. Nevertheless, the District Court held that "[I]t is highly unlikely that Massachusetts lawyers could provide the same services at the same expense to the customer as NREIS provides." [RA.901] There was no factual support for this conclusion. The District Court instead relied on a statement from a 1949 Supreme Court case. Where there is no evidence to support it, the District Court's Judgment must be reversed.

COUNCLUSION

For the reasons specified above, REBA requests that the District Court's Judgment be reversed and that this Court certify questions to the SJC or find that conveyancing (title examination, resolution of title defects, settlement of the transaction, and recordation) is the practice of law in Massachusetts and restricting those activities to attorneys does not violate the dormant Commerce Clause.

THE REAL ESTATE BAR ASSOCIATION
FOR MASSACHUSETTS, INC.

By its Attorneys,

/s/ Douglas W. Salvesen
/s/ Anthony B. Fioravanti

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February 5, 2010

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/s/ Douglas W. Salvesen

Attorney for Appellant

Dated: February 5, 2010

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I hereby certify that this document was filed through the ECF system and served electronically on opposing counsel who is a registered participant.

/s/ Douglas W. Salvesen

Attorney for Appellant

Dated: February 5, 2010

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THE REAL ESTATE BAR ASSOCIATION
FOR MASSACHUSETTS, INC.,

Plaintiff,

v.

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

Defendants.

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Civil Action No. 07-10224-JLT

ORDER OF JUDGMENT

April 13, 2009

TAURO, J.

For the reasons set forth in the accompanying Memorandum, this court hereby orders that:

1. Defendants' Motion for Summary Judgment [#59] and Motion for Summary Judgment on Dormant Commerce Clause Counterclaim [#79] are ALLOWED.
2. Plaintiff's Motion for Summary Judgment [#69] is DENIED.
3. Defendants' Motion for Leave to File [#96] is ALLOWED AS MOOT.
4. Plaintiff is enjoined from enforcing on Defendants its interpretation of the practice of law as encompassing (1) all the interconnected activities of a real estate conveyance and (2) the issuance of title insurance.
5. Each side shall bear its own costs.

IT IS SO ORDERED.

/s/ Joseph L. Tauro
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THE REAL ESTATE BAR ASSOCIATION
FOR MASSACHUSETTS, INC.,

Plaintiff,

v.

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

Defendants.

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Civil Action No. 07-10224-JLT

MEMORANDUM

April 13, 2009

TAURO, J.

I. Introduction

Plaintiff claims that real estate conveyancing and the issuance of title insurance constitute the practice of law in Massachusetts and that Defendants, nonlawyers who conduct such services, have engaged in the unauthorized practice of law. Plaintiff also claims that Defendants have engaged in the unauthorized practice of law by conducting so-called “notary closings.” Defendants counterclaim that Plaintiff’s interpretation of what constitutes the practice of law under the Massachusetts unauthorized practice of law statutes violates the Dormant Commerce Clause of the U.S. Constitution. Both Parties seek declaratory and injunctive relief. Presently at issue are Parties’ cross-motions for summary judgment. For the following reasons, Defendants’ Motion for Summary Judgment and Motion for Summary Judgment on Dormant Commerce Clause Counterclaim are ALLOWED, and Plaintiff’s Motion for Summary Judgment is DENIED.

II. Background¹

Plaintiff The Real Estate Bar Association for Massachusetts, Inc. (“REBA”), formerly known as the “Massachusetts Conveyancers Association, Inc.,” is a bar association comprised of approximately 3,000 Massachusetts real estate attorneys. National Real Estate Information Services, Inc. is a Pennsylvania corporation and the general partner of National Real Estate Information Services, a Pennsylvania limited partnership (collectively “NREIS”). NREIS is a multistate real estate settlement services provider, or “vendor manager,” and title insurance agency.²

As a vendor manager, NREIS provides services related to residential real estate transactions. NREIS’s services include title examinations, settlement services, deed preparation, and disbursement of mortgage loan proceeds. NREIS obtains the relevant title search information from a third-party vendor, such as Connelly Title Services, Inc. For real estate purchases, NREIS hires North American Deed Company, Inc., located in Las Vegas, Nevada, to prepare the deed. NREIS then schedules the real estate closing with, and transmits the relevant closing documents to, a Massachusetts attorney. After the closing, NREIS disburses the settlement funds, reviews the transaction documents to guarantee their proper completion, and ensures that the relevant documents are properly recorded. In addition to these activities, NREIS issues title insurance policies to lenders and property owners.

¹This court presents these facts in the light most favorable to Plaintiff, the party that does not prevail on summary judgment. See *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 34 (1st Cir. 2005) (“[L]ike the district court, we must scrutinize the record in the light most favorable to the summary judgment loser and draw all reasonable inferences therefrom to that party’s behoof.”).

²REBA also named as a defendant Mark S. Solomon, whom this court dismissed on March 5, 2007.

REBA brought this action on November 6, 2006 in the Superior Court, Suffolk County, and filed the Amended Complaint on February 2, 2007. REBA's claims seek (1) a declaratory judgment that NREIS's alleged "notary closings" constitute the unauthorized practice of law; (2) a declaratory judgment that NREIS's real estate conveyancing services constitute the unauthorized practice of law; and (3) a permanent injunction barring NREIS from engaging in the unauthorized practice of law.³ NREIS removed to this court and filed the Answer and Counterclaim on February 6, 2007. NREIS's Counterclaim seeks (1) a declaratory judgment that REBA's interpretation of what constitutes the practice of law under the Massachusetts unauthorized practice of law statutes violates the Dormant Commerce Clause; and (2) a permanent injunction barring REBA from enforcing on NREIS its interpretation of what constitutes the practice of law.⁴

On October 17, 2008, NREIS moved for summary judgment on all REBA's claims. On December 12, 2008, REBA also moved for summary judgment on all its claims. On February 6, 2009, NREIS moved for summary judgment on its Dormant Commerce Clause Counterclaim.

III. Discussion

At the core of REBA's claims is its argument that real estate conveyancing constitutes the practice of law in Massachusetts. This contention rests on the premise that real estate conveyancing is an "interconnected series of activities that must be performed in order to convey the various legal interests in the real estate."⁵ According to REBA, real estate conveyancing consists of a cohesive

³Specifically, REBA brings this action under chapter 221, sections 46, 46A, and 46B of the Massachusetts General Laws. See *infra* notes 25–27.

⁴A party may bring a Dormant Commerce Clause claim under 42 U.S.C. § 1983. See *Dennis v. Higgins*, 498 U.S. 439, 448 (1991).

⁵Pl.'s Mem. Supp. Summ. J. 1, Dec. 12, 2008.

set of steps, each of which is inseparable from the other, that is necessary to effect a legal transfer of real estate. Broadly, these steps consist of the following: (1) examination of legal title; (2) resolution of any clouds on title; (3) the settlement, or “closing”; and (4) recordation of title documents and disbursement of mortgage proceeds.

REBA’s initial step in a real estate conveyance is the title examination. This process generally begins at the registry of deeds, where the title searcher initiates the title examination by working backwards from the present owner’s deed to a deed that is facially valid and at a statutorily prescribed starting point.⁶ Then, the title searcher “runs” the title forward from the starting point, examining every deed from every grantor in the chain of title and reviewing the title for any “clouds.” The examination may also require review of off-record matters to determine the state of title.

REBA’s next step is the resolution of any clouds on title. Clouds on title are defects that originate from some claim or encumbrance.⁷ Because clouds on title can arise in numerous ways, the ways in which they can be cured are equally numerous. For example, if an outstanding mortgage encumbers title, the cure may be settlement of the mortgage. For other title defects, the cure may require the execution of documents. For more difficult title defects, the cure may require judicial intervention.

REBA’s third step is the closing. Before the closing, all necessary documents must be

⁶For Massachusetts residential real estate, the title examination must “cover[] a period of at least fifty years with the earliest instrument being a warranty or quitclaim deed which on its face does not suggest a defect in said title.” Mass. Gen. Laws Ann. ch. 93, § 70 (West 2009).

⁷See Black’s Law Dictionary 272 (8th ed. 2004) (“A defect or potential defect in the owner’s title to a piece of land arising from some claim or encumbrance, such as a lien, an easement, or a court order.”).

drafted. In Massachusetts, these documents may include the application for the mortgage loan, the acceptance of the mortgage commitment, an agreement as to the adjustment of property taxes, an affidavit of owner occupancy, a notice of the lead paint law and a release of the lender from liability,⁸ a smoke detector certification agreement,⁹ a certificate regarding an approved carbon monoxide alarm,¹⁰ a certificate of nonforeign status,¹¹ an affidavit permitting the lender to obtain title insurance without exceptions for mechanics' liens and persons in possession, the truth-in-lending disclosure statement,¹² disclosure of the lender's intent with respect to the assignment of mortgage loan servicing,¹³ a notice of the three-day right to rescind for mortgage refinances,¹⁴ the promissory note, and the mortgage. An additional document related to the closing is the settlement statement, which accounts for the transaction proceeds. For federally regulated mortgage loans, a Uniform Settlement Statement must be completed.¹⁵ At the closing, the parties exchange and sign the necessary documents, and transfer the required consideration. For real estate purchases, a valid deed must be executed. After the parties have executed the necessary documents, the Uniform Settlement Statement must be executed.

⁸See Mass. Gen. Laws Ann. ch. 111, §§ 190–199.

⁹See *id.* ch. 148, §§ 26E, 26F.

¹⁰See *id.* § 26F 1/2.

¹¹See I.R.C. § 1445 (2006).

¹²See 15 U.S.C.A. §§ 1601–1638 (West 2009).

¹³See 12 U.S.C.A. § 2605(a) (West 2009).

¹⁴See 15 U.S.C.A. § 1635.

¹⁵See 24 C.F.R. § 3500.8 (2009).

REBA contends that NREIS's alleged practice of "notary closings" constitutes the unauthorized practice of law. According to REBA, a "notary closing" is a closing in which an attorney attends the settlement but

is not involved in the preparation or review of documents to be executed by the parties, the examination or review of title, the recording of documents or the disbursement of funds to pay off existing mortgages. The attorney has no role in the process of reviewing the title or clearing the title to the real estate being conveyed. He simply is there to witness the parties execute the necessary documents—much like a notary.¹⁶

REBA's final step is the recordation of title documents and disbursement of mortgage proceeds. Though execution and delivery of the deed suffices to transfer a legal property interest between the parties to a real estate transaction, the title documents must be recorded at the registry of deeds. These include the deed, mortgage, and any other necessary documents. Aside from the mortgage loan proceeds, which are due to the mortgagor before the deed or mortgage may be recorded,¹⁷ the loan proceeds are then disbursed in accordance with the Uniform Settlement Statement.

In addition to its claims that the practice of law encompasses all the interconnected steps of a real estate conveyance and that "notary closings" constitute the unauthorized practice of law, REBA asserts that the issuance of title insurance must be performed or directed by lawyers.

A. Legal Standard for Summary Judgment

A court may grant summary judgment when the moving party has shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of

¹⁶Pl.'s Mem. Supp. Summ. J. 20, Dec. 12, 2008.

¹⁷See Mass. Gen. Laws Ann. ch. 183, § 63B.

law.”¹⁸ The court must examine the facts in the light most favorable to the nonmoving party, resolving any reasonable inference in that party’s favor.¹⁹ The opposing party has the burden of production to “set forth specific facts showing that there is a genuine issue for trial.”²⁰ Neither party, however, “may rely on conclusory allegations or unsubstantiated denials, but must identify specific facts derived from the pleadings, depositions, answers to interrogatories, admissions, and affidavits to demonstrate either the existence or absence of an issue of fact.”²¹ Summary judgment may enter when a party fails to show evidence sufficient to establish an essential element of its case on which it bears the burden of proof at trial.²²

B. The Practice of Law in Massachusetts

The judicial branch of government has exclusive power to determine what constitutes the practice of law.²³ The legislature may not extend the privilege to practice law to persons that the judiciary does not admit, but it may enact laws forbidding the “practice of the law by corporations or associations or by individuals other than members of the bar.”²⁴ To this end, the Massachusetts legislature has passed “unauthorized practice of law” statutes proscribing the practice of law by

¹⁸Fed. R. Civ. P. 56(c).

¹⁹Dasey v. Anderson, 304 F.3d 148, 153 (1st Cir. 2002).

²⁰Fed. R. Civ. P. 56(e).

²¹Magee v. United States, 121 F.3d 1, 3 (1st Cir. 1997).

²²See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

²³E.g., In re Opinion of the Justices, 194 N.E. 313, 316 (Mass. 1935) (“It is inherent in the judicial department of government under the Constitution to control the practice of the law, the admission to the bar of persons found qualified to act as attorneys at law and the removal from that position of those once admitted and found to be unfaithful in their trust.”).

²⁴Id. (internal quotations omitted).

corporations or associations²⁵ and persons not authorized to practice.²⁶ Any bar association within the commonwealth may petition the courts to restrain violations of the Massachusetts unauthorized practice of law statutes.²⁷

As the Massachusetts Supreme Judicial Court (“SJC”) has stated, “It is not easy to define the practice of law.”²⁸ The SJC has addressed the question of what constitutes the practice of law on a case-by-case basis, explaining that “[t]o a large extent each case must be decided upon its own particular facts.”²⁹ Indeed, the SJC has found it “impossible to frame any comprehensive and satisfactory definition of what constitutes the practice of law.”³⁰

Though the SJC has declined to fashion a comprehensive definition, it has provided a general outline of the activities that constitute the practice of law:

[A]t least it may be said that in general the practice of directing and managing the enforcement of legal claims and the establishment of the legal rights of others, where it is necessary to form and to act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them, the practice of giving or furnishing legal advice as to such rights and methods and the practice, as an occupation, of drafting documents by which such rights are created, modified, surrendered or secured are all aspects of the practice of law.³¹

The SJC has also added that “the examination of statutes, judicial decisions, and departmental

²⁵See Mass. Gen. Laws Ann. ch. 221, § 46 (prohibiting the unauthorized practice of law by corporations and associations).

²⁶See *id.* § 46A (prohibiting the unauthorized practice of law by individuals).

²⁷See *id.* § 46B.

²⁸*Lowell Bar Ass’n v. Loeb*, 52 N.E.2d 27, 31 (Mass. 1943).

²⁹*In re Shoe Mfrs. Protective Ass’n*, 3 N.E.2d 746, 748 (Mass. 1936).

³⁰*Id.*

³¹*Id.*

rulings, for the purpose of advising upon a question of law . . . and the rendering to a client of an opinion thereon, are likewise part of the practice of law.”³²

1. Real Estate Conveyancing

Central to REBA’s claims in this case is the SJC’s 1935 advisory opinion In re Opinion of the Justices,³³ in which the SJC stated that the “[p]ractice of law . . . embraces conveyancing.”³⁴ REBA relies on this statement in arguing that the SJC intended the term “conveyancing” to include not only the closing, but also the initial title search, resolution of any clouds on title, and the recordation of title documents and disbursement of mortgage proceeds after the closing. But REBA’s interpretation of the term “conveyancing” for purposes of defining what constitutes the practice of law is undercut by the very case on which REBA relies. Later in In re Opinion of the Justices, the SJC listed activities that “do not constitute the practice of law” and included “the search of records of real estate to ascertain what may there be disclosed without giving opinion or advice as to the legal effect of what is found.”³⁵ Instead of defining “conveyancing” broadly to include simple title searches, the SJC explicitly rejected an interpretation of the practice of law that would include a title search absent the giving of any legal advice.

Furthermore, the definition of “conveyance” is a “transfer of an interest in real property from one living person to another, by means of an instrument such as a deed.”³⁶ The definition of

³²Loeb, 52 N.E.2d at 33.

³³194 N.E. 313.

³⁴Id. at 317.

³⁵Id. at 318.

³⁶Black’s Law Dictionary, *supra* note 7, at 358.

“conveyancing” is “[t]he act or business of drafting and preparing legal instruments, esp[ecially] those (such as deeds or leases) that transfer an interest in real property.”³⁷ These definitions correspond with the closing and the preparation therefor, not with other activities that REBA asserts are interconnected to a real estate conveyance. Finally, this reading is in line with what Parties apparently agree is the current practice in Massachusetts of having an attorney supervise the closing.³⁸

Later opinions by the SJC also appear to reject REBA’s broad reading of In re Opinion of the Justices. In Lowell Bar Ass’n v. Loeb, the SJC adopted “the proposition that the drafting of documents, when merely incidental to the work of a distinct occupation, is not the practice of law, although the documents have legal consequences.”³⁹ The SJC proceeded to hold in Loeb that “the preparation of the income tax returns in question, though it had to be done with some consideration of the law, did not lie wholly within the field of the practice of law.”⁴⁰ In Goldblatt v. Corp. Counsel of Boston, the SJC “assume[d] that persons, who are not attorneys, may do research in the registries of deeds, make reports (and even recommendations) to attorneys, and give practical

³⁷Id.

³⁸See, e.g., Defs.’ Mem. Supp. Summ. J. Counterclaim 16, Feb. 6, 2009 (“NREIS schedules the closing on a real estate transaction with a Massachusetts attorney[,] . . . [a]lthough NREIS does not concede that Massachusetts lawyers are necessary to avoid conflict with the UPL statute”); Benincasa Dep. 88:13–15, Sept. 23, 2008 (stating, as NREIS’s Senior Director of Settlement Services, that according to her “understanding, in the State of Massachusetts, an attorney must conduct the closing, not a notary”).

³⁹52 N.E.2d at 31.

⁴⁰Id. at 34.

advice with respect to the possibilities of collecting particular taxes.”⁴¹ And in In re Chimko, the SJC held that “preparation of [a] reaffirmation agreement is akin to the nonattorney’s preparation of preprinted income tax returns, conduct [the SJC has] held not to be the practice of law.”⁴² The SJC also held in In re Chimko that filing a pleading with a bankruptcy court and using law firm letterhead for correspondences did not constitute the practice of law.⁴³

These cases imply that certain steps that REBA asserts are related to a real estate conveyance do not, by themselves, constitute the practice of law in Massachusetts. Such steps include conducting a simple title search⁴⁴ and completing forms in preparation for a closing.⁴⁵ The common thread in these cases is that the party accused of engaging in the unauthorized practice of law did not “invoke[] his professional judgment in applying legal principles to address [a client’s] individualized needs . . . or dispense[] legal advice.”⁴⁶ The same can be said of certain steps that REBA argues are interconnected to a real estate conveyance.

REBA concedes that “not every step in [a conveyancing] process is a legal act” but still argues that “because these steps are necessary and integral to a conveyance of real property, they

⁴¹277 N.E.2d 273, 277 (Mass. 1971).

⁴²831 N.E.2d 316, 322 (Mass. 2005).

⁴³See id. at 322–24.

⁴⁴See Goldblatt, 277 N.E.2d at 277 (nonattorneys may “do research in the registries of deeds”); In re Opinion of the Justices, 194 N.E. at 318 (nonattorneys may perform a “search of records of real estate to ascertain what may there be disclosed without giving opinion or advice as to the legal effect of what is found”).

⁴⁵See In re Chimko, 831 N.E.2d at 322 (nonattorneys may prepare reaffirmation agreements); Loeb, 52 N.E.2d at 34 (nonattorneys may prepare preprinted income tax returns).

⁴⁶In re Chimko, 831 N.E.2d at 322 (citations and quotations omitted).

either must be performed by the attorney or be within the attorney's control or supervision."⁴⁷ This distinction, however, appears to be at odds with the above cases and with Massachusetts law providing that "the practice of directing and managing . . . the establishment of the legal rights of others" constitutes the practice of law.⁴⁸ In other words, the SJC does not distinguish between practicing law and directing others who are practicing law—both qualify as the practice of law. Contrary to REBA's assertions, this suggests that because an attorney would be required to perform or direct any activity that does constitute the practice of law, an attorney would not be required to direct an activity that, by itself, does not qualify as the practice of law.

Beyond the above rulings appearing to contradict REBA's broad construction of the practice of law, the SJC has not explicitly addressed whether the practice of law embraces all the interconnected activities of a real estate conveyance. REBA's citations to non-SJC opinions⁴⁹ are

⁴⁷Pl.'s Mem. Opp'n Defs.' Mot. Summ. J. 5, Mar. 9, 2009.

⁴⁸In re Shoe Mfrs. Protective Ass'n, 3 N.E.2d at 748.

⁴⁹Cf. Mass. Conveyancers Ass'n, Inc. v. Colonial Title & Escrow, Inc., No. Civ.A. 96-2746-C, 2001 WL 669280, at *7-8 (Mass. Super. Ct. June 5, 2001) (holding that the following activities constitute the practice of law: (1) "Evaluating title to real estate to determine the interest created, transferred or terminated and communicating that evaluation to any interested party to a residential real estate transaction"; (2) "Evaluating and ensuring that parties to a real estate transaction have complied with their agreements"; (3) "Preparing, drafting or reviewing legal documents that affect title to real estate or affect the obligation of the parties to the real estate transactions"; (4) "Explaining at the closing any documents relating to the interest in the real estate being created, transferred or terminated and relating to the agreement of the parties"; (5) "Issuing title certification or policy of title insurance premised on Colonial's evaluation of title to real estate"; (6) "Holding itself out to lenders, title insurance companies or members of the public as willing and able to perform the functions enumerated in paragraphs 1-5 herein"; and (7) "Representing lenders as their closing agents"); Mass. Ass'n of Bank Counsel, Inc. v. Closings, Ltd., No. 903053C, 1993 WL 818916, at *2 (Mass. Super. Ct. Sept. 2, 1993) (holding that: (1) "The practice of law in Massachusetts includes the handling of residential real estate conveyancing and the following specific acts: (a) the preparation of deeds, mortgages, releases, transfers and other instruments affecting title to real estate and other agreements in connection with residential

not helpful, as they do not carry precedential value.⁵⁰ REBA has also cited In re Eric Levine,⁵¹ an opinion issued by Justice Sosman sitting in review of a Board of Bar Overseers disciplinary matter. Though Justice Sosman extended the suspension of Mr. Levine's bar license due to his engaging in activities similar to those at issue in this case, Justice Sosman was not speaking for the entire SJC and explicitly declined "to define the precise boundary between the provision of essentially administrative services preparatory to real estate transactions and the provision of legal services in connection with such transactions."⁵²

This court recognizes that the SJC has addressed the issue of what constitutes the practice of law on a case-by-case basis.⁵³ In accordance with that approach, the absence of an SJC opinion directly on point, and principles of federalism, this court declines to adopt REBA's novel construction of the practice of law as encompassing all the interconnected steps of a real estate conveyance.⁵⁴

real estate closings; and (b) advising persons, firms and corporations as to their legal rights in connection with the conveyance of residential real estate"; and (2) "Through the use of lawyers, who are directed by and subject to the control of persons not members of the bar of the Commonwealth, to perform the above described services Closings is holding itself out as being able to handle all aspect of residential real estate closings, and therefore, Closings is in violation of G.L.c. 221, § 4").

⁵⁰See, e.g., Johnson v. Fankell, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State. . . . This proposition [is] fundamental to our system of federalism" (citations omitted)).

⁵¹No. BD-2002-075, 2004 WL 5214985 (Mass. St. Bar Disp. Bd. Apr. 15, 2004).

⁵²Id.

⁵³See In re Shoe Mfrs. Protective Ass'n, 3 N.E.2d at 748.

⁵⁴See Fankell, 520 U.S. at 916.

2. “Notary Closings”

The statement in In re Opinion of the Justices that the practice of law embraces “conveyancing” reflects an expectation that an attorney have at least some involvement with the closing.⁵⁵ Beyond that, the SJC has not provided guidance as to the level of involvement an attorney must have in preparing for and conducting the closing. Parties agree that NREIS engages an attorney to conduct the closing. Beyond REBA’s conclusory allegations that “the attorneys that are sent to the settlement are more ‘signing agent’ than attorney” and that the attorney “simply is there to witness,”⁵⁶ REBA has not identified specific facts demonstrating that NREIS has engaged in the unauthorized practice of law at the closing stage.⁵⁷ To the contrary, NREIS attests that the attorneys it hires to conduct the closing fully satisfy and execute their professional obligations.⁵⁸ Accordingly, REBA’s claim that NREIS is engaged in the unauthorized practice of law by conducting “notary closings” fails.

⁵⁵See supra notes 35–38 and accompanying text.

⁵⁶Pl.’s Mem. Supp. Summ. J. 20, Dec. 12, 2008.

⁵⁷See, e.g., Magee, 121 F.3d at 3 (“Neither party may rely on conclusory allegations or unsubstantiated denials, but must identify specific facts derived from the pleadings, depositions, answers to interrogatories, admissions, and affidavits to demonstrate either the existence or absence of an issue of fact.”).

⁵⁸See, e.g., Lammert Aff. 4 (“NREIS does not ask, request or instruct the Massachusetts attorneys who are engaged to conduct closings in Massachusetts to act in any capacity other than as an attorney or to perform his or her job other than in full compliance with the applicable legal and ethical requirements in Massachusetts. Indeed, NREIS expects that the Massachusetts lawyers who are engaged for these closings advise the lender of any legal or ethical issues that would prevent those lawyers from complying with these requirements. NREIS expects the attorneys engaged to complete the closings to represent their client—the lender—as they would at any residential real estate closing and to act consistently with their professional obligations as attorneys.”).

3. The Issuance of Title Insurance

Massachusetts law is clear that the issuance of title insurance need not be performed or directed by an attorney. The Massachusetts Rules of Professional Conduct, as set out in SJC Rule 3:07, expressly permit the issuance of title insurance by nonlawyers. Rule 5.7(b) of the Rules of Professional Conduct provides, “The term ‘law-related services’ denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.”⁵⁹ Comment 9 to Rule 5.7(b) then specifically identifies “providing title insurance” as an example of a “law-related service.”⁶⁰ Accordingly, REBA’s claim that the issuance of title insurance constitutes the practice of law fails.

C. The Dormant Commerce Clause

Because the SJC has not explicitly addressed whether the practice of law embraces all the interconnected activities of a real estate conveyance, this court reaches NREIS’s argument that such an interpretation would violate the Dormant Commerce Clause. Relying on the First Circuit’s decision in National Revenue Corp. v. Violet, which held that a Rhode Island statute defining debt collecting as the practice of law violated the Dormant Commerce Clause,⁶¹ NREIS contends that, by including activities that, by themselves, do not constitute the practice of law, REBA’s

⁵⁹Mass. R. Prof. C. 5.7(b) (2008) (emphasis added).

⁶⁰Id. cmt. 9.

⁶¹807 F.2d 285, 288–90 (1st Cir. 1986).

interpretation of the practice of law would place an impermissible burden on interstate commerce.⁶²

This court agrees.

1. Legal Standard for Dormant Commerce Clause Claims

The Commerce Clause grants Congress the power to “regulate commerce . . . among the several states.”⁶³ Courts have interpreted “[t]his affirmative grant of power to the federal sovereign . . . to strip state governments of any authority to impede the flow of goods [or services] between states.”⁶⁴ This so-called “Dormant Commerce Clause” doctrine⁶⁵ prohibits the “economic protectionism” embodied in the “[p]reservation of local industry by protecting it from the rigors of interstate competition.”⁶⁶ A party may enforce its right to be free from state regulation of the interstate flow of goods or services under 40 U.S.C. § 1983.⁶⁷

The Supreme Court has adopted “a two-tiered approach” to the Dormant Commerce Clause

⁶²Cf. id. at 289 (“[T]he question remains whether, by including activities that fall short of court proceedings, the state has put an impermissible burden on interstate commerce.”).

⁶³U.S. Const. art. I, § 8, cl. 3.

⁶⁴Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28, 32–33 (1st Cir. 2007).

⁶⁵See id. at 33.

⁶⁶W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 205 (1994).

⁶⁷NREIS has met the § 1983 threshold requirement of state action because REBA is acting under color of state law. A private actor is engaged in state action for purposes of § 1983 if the private actor “assumes a traditional public function when it undertakes to perform the challenged conduct.” Perkins v. Londonderry Basketball Club, 196 F.3d 13, 18 (1st Cir. 1999). The “public function” test requires that the private actor assume powers “traditionally [and] exclusively reserved to the State.” Rockwell v. Cape Cod Hosp., 26 F.3d 254, 258 (1st Cir. 1994) (citations and quotations omitted). Here, the Massachusetts legislature delegated the authority to enforce the statutory prohibition against the unauthorized practice of law to any “bar association within the Commonwealth.” Mass. Gen. Laws Ann. ch. 221, § 46B. REBA is a Massachusetts bar association.

analysis.⁶⁸ First, “[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests,” the state law is “generally struck down . . . without further inquiry.”⁶⁹ To fall into this first tier, the state law must “discriminate against interstate commerce ‘either on its face or in practical effect.’”⁷⁰ In these situations, the state law “will be sustained only when it promotes a legitimate state interest that cannot be achieved through any reasonable nondiscriminatory alternative.”⁷¹

Second, when a state law “has only indirect effects on interstate commerce and regulates evenhandedly,” the court conducts the “Pike balancing test.”⁷² According to the Pike balancing test, if the burden on interstate commerce is incidental, the state law “will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”⁷³ The Supreme Court “has candidly undertaken a balancing approach in resolving these issues, . . . but more frequently it has spoken in terms of ‘direct’ and ‘indirect’ effects and burdens.”⁷⁴

2. National Revenue Corp. v. Violet

At issue in Violet was a Rhode Island statute that included under the term “practice of law”

⁶⁸See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578 (1986).

⁶⁹Id. at 579.

⁷⁰Maine v. Taylor, 477 U.S. 131, 138 (1986) (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)).

⁷¹Cherry Hill, 505 F.3d at 33.

⁷²Brown-Forman, 476 U.S. at 579.

⁷³Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

⁷⁴Id.

“the undertaking or acting as a representative or on behalf of another person to commence, settle, compromise, adjust or dispose of any civil or criminal case or cause of action.”⁷⁵ The First Circuit agreed with the District of Rhode Island that the statute applied to debt collecting. Then–Attorney General of Rhode Island Arlene Violet defended the statute on the grounds that “debt collection practices are intimately related to the use of state courts and the regulation of the practice of law in those courts.”⁷⁶

Here, REBA’s reasoning is nearly identical to the argument that the Rhode Island attorney general presented in Violet. REBA contends that any step that is “interconnected” to a real estate conveyance, including steps that REBA concedes do not, by themselves, constitute the practice of law, must be performed or supervised by a lawyer because they “are necessary and integral to a conveyance of real property.”⁷⁷ Just as REBA argues that there is an “interconnected series of activities” that is essential to a real estate conveyance,⁷⁸ Ms. Violet argued that “debt collection practices are intimately related to the use of state courts.”⁷⁹ The method and motivation in this case essentially mirror those in Violet. The method is to require an attorney to perform or direct activities that do not, by themselves, constitute the practice of law because those activities happen to be closely related to activities that do constitute the practice of law. The motivation, to a large

⁷⁵Violet, 807 F.2d at 288 (citation and quotation omitted).

⁷⁶Id. at 289 (citation and quotation omitted).

⁷⁷Pl.’s Mem. Opp’n Defs.’ Mot. Summ. J. 4, 5, Mar. 9, 2009.

⁷⁸Id. at 4 (quoting Pl.’s Mem. Supp. Summ. J. 1–2, Dec. 12, 2008).

⁷⁹Violet, 807 F.2d at 289.

extent, is “to benefit the local bar.”⁸⁰

Like the Rhode Island statute in Violet, REBA’s construction of the practice of law falls into the first tier of the Dormant Commerce Clause analysis.⁸¹ Labeling any activity that happens to be interrelated to a real estate conveyance the “practice of law” in Massachusetts would force out-of-state vendor services, like NREIS, to employ individuals who possess a Massachusetts legal license or to subcontract their services out to Massachusetts attorneys. Either way, REBA’s interpretation of the practice of law would be a substantial burden on interstate commerce “on its face [and] in practical effect.”⁸²

REBA contends that this case does not fall into the first tier of the Dormant Commerce Clause analysis because jurisprudence proscribing the unauthorized practice of law “applies even-handedly against all non-attorneys, whether they reside in Massachusetts or they reside out-of-state.”⁸³ This argument is flawed, however, because the majority of individuals who are licensed to practice law in Massachusetts would undoubtedly also be Massachusetts residents. As the First Circuit found in Violet, conferring the “practice of law” label on an activity “effectively bars out-of-staters from offering a commercial service within [the commonwealth’s] borders and confers the

⁸⁰Id. at 290; see also Chris Reidy, Massachusetts Measure Aims to Trim Closing Costs on Home Sales, Boston Globe, June 26, 2004 (quoting a REBA officer as stating “We don’t need outsiders coming into Massachusetts and telling us how to do things”).

⁸¹Judge Torruella dissented in Violet, finding that the Rhode Island statute imposed an “incidental and thus not unconstitutional” burden on interstate commerce. See 807 F.2d at 290–91. As explained below, REBA’s argument would fail even under the second tier of the Dormant Commerce Clause analysis because the burden on interstate commerce would be “clearly excessive in relation to the putative local benefits.” Pike, 397 U.S. at 137.

⁸²Taylor, 477 U.S. at 138 (citation and quotation omitted).

⁸³Pl.’s Mem. Opp’n Defs.’ Mot. Summ. J. 16, Mar. 9, 2009.

right to provide that service—and to reap the associated economic benefit—upon a class largely composed of [Massachusetts] citizens.”⁸⁴

An overbroad definition of the practice of law would have a substantial effect on interstate commerce. It is highly unlikely that Massachusetts lawyers could provide the same services at the same expense to the customer as NREIS provides. Evidence for this proposition are “the savings normally attributable to large scale operation” and “the very existence of national companies like [NREIS].”⁸⁵ Moreover, REBA’s definition of the practice of law would “deprive[] the citizens of [Massachusetts] of any benefits arising from competition.”⁸⁶

Because REBA’s definition of the practice of law would substantially affect interstate commerce, it is sustainable only if “it promotes a legitimate state interest that cannot be achieved through any reasonable nondiscriminatory alternative.”⁸⁷ REBA has not made such a showing. REBA is correct that “the States’ interest in regulating the practice of law is ‘substantial’ and ‘compelling.’”⁸⁸ But, as Massachusetts law implies and as REBA concedes, not every interconnected step of a real estate conveyance, by itself, constitutes the practice of law. REBA’s legitimate state interest “not in the protection of the bar from competition, but in the protection of

⁸⁴807 F.2d at 290.

⁸⁵Id.

⁸⁶Id. (citing H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949) (“Our system, fostered by the Commerce Clause, is that . . . every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.”)).

⁸⁷Cherry Hill, 505 F.3d at 33.

⁸⁸Pl.’s Mem. Opp’n Defs.’ Mot. Summ. J. 17, Mar. 9, 2009 (citing Fla. Bar v. Went for It, Inc., 515 U.S. 618, 625 (1995)).

the public from being advised and represented in legal matters by incompetent and unreliable persons,”⁸⁹ therefore, would only apply to activities that actually qualify as the practice of law. Though the commonwealth’s interest in “maintain[ing] the integrity and reliability of [its] recording system” is important, it could be protected through nondiscriminatory means that are less restrictive than requiring a Massachusetts law license. The requirements for admission to the Massachusetts bar are justifiably rigorous.⁹⁰ Imposition of these requirements is reserved for activities that themselves constitute the practice of law.

Accordingly, NREIS is entitled to a declaratory judgment that REBA’s interpretation of the practice of law as encompassing all the interconnected steps of a real estate conveyance violates the Dormant Commerce Clause.⁹¹ Because NREIS has satisfied the requirements for a permanent injunction,⁹² NREIS is also entitled to an order enjoining REBA from enforcing its construction of the practice of law. NREIS has prevailed on the merits. NREIS would suffer severe economic

⁸⁹Loeb, 52 N.E.2d at 31.

⁹⁰For admission by examination, these requirements include the recommendation of a member of the bar, the equivalent of a high school diploma, the equivalent of a bachelor’s degree, an American Bar Association- or a commonwealth-approved law license, successful completion of the Multistate Professional Responsibility Examination and the Massachusetts Bar Examination, and satisfaction of certain character and fitness requirements. S.J.C. Rule 3:01 (2000).

⁹¹This holding addresses the constitutionality of REBA’s interpretation of what constitutes the unauthorized practice of law under chapter 221, sections 46 and 46A of the Massachusetts General Laws, not the constitutionality of sections 46 and 46A themselves.

⁹² See, e.g., Asociación de Educación Privada de P.R., Inc. v. García-Padilla, 490 F.3d 1, 8 (1st Cir. 2007) (“The standard for issuing a permanent injunction requires the district court to find that (1) plaintiffs prevail on the merits; (2) plaintiffs would suffer irreparable injury in the absence of injunctive relief; (3) the harm to plaintiffs would outweigh the harm the defendant would suffer from the imposition of an injunction; and (4) the public interest would not be adversely affected by an injunction.”).

hardships if REBA were able to enforce its interpretation of the practice of law so as to preclude NREIS from performing real estate conveyancing and title insurance services in Massachusetts.⁹³ NREIS's economic hardships would outweigh any harm that REBA would suffer in being precluded from enforcing its overbroad interpretation of the practice of law. And the public interest would be best served by preserving competition in the markets for real estate conveyancing and title insurance services.

IV. Conclusion

For the reasons stated above, NREIS's Motion for Summary Judgment and Motion for Summary Judgment on Dormant Commerce Clause Counterclaim are ALLOWED, and REBA's Motion for Summary Judgment is DENIED. REBA is enjoined from enforcing on NREIS its interpretation of the practice of law as encompassing (1) all the interconnected activities of a real estate conveyance and (2) the issuance of title insurance.

Each side shall bear its own costs.

AN ORDER HAS ISSUED.

/s/ Joseph L. Tauro
United States District Judge

⁹³See, e.g., Lammert Aff. 6 ("The financial loss to NREIS of the ability to provide settlement services and title insurance for Massachusetts transactions would be substantial.").

the mortgagor has good right to sell and convey the same; and that he will, and his heirs, executors, administrators and successors shall, warrant and defend the same to the mortgagee and his heirs, successors and assigns forever against the lawful claims and demands of all persons; and that the mortgagor and his heirs, successors or assigns, in case a sale shall be made under the power of sale, will, upon request, execute, acknowledge and deliver to the purchaser or purchasers a deed or deeds of release confirming such sale; and that the mortgagee and his heirs, executors, administrators, successors and assigns are appointed and constituted the attorney or attorneys irrevocable of the said mortgagor to execute and deliver to the said purchaser a full transfer of all policies of insurance on the buildings upon the land covered by the mortgage at the time of such sale.”

I. CONVEYANCING

5. Conveyancing refers to that interconnected series of activities that must be performed in order to convey the various legal interests in the real estate as required under the parties’ respective agreements to ensure that the buyer receives a “good and clear record and marketable” title to the real estate and the lender receives a valid mortgage interest.

6. A conveyance of property can be described in four related phases. First, there must be a determination that the seller or mortgagor validly holds the legal title in the real estate that he purports to possess and has agreed to convey. Second, if there are any flaws in his legal title, such flaws must be resolved in order for the seller or mortgagor to be able to convey the promised quality of title to the real estate. Third, the required legal documents and promised consideration necessary to transfer the legal interests in the property must be executed and exchanged at the settlement or “closing” of the transaction. Fourth, the appropriate documents necessary to create the various legal interests in the real estate must be recorded at the registry of deeds.

7. The specific activities of a conveyance that are undertaken to ensure that the creation, transfer, or termination of the legal interest in the real estate occurs in accordance with the intent of the

- **Conveyancing Attorney Assesses Record Title Matters.**

11. In order to assess the quality of a record title for property in connection with a loan that will be secured by a mortgage on that property, the conveyancing attorney first reviews the record documents. The examination of title generally begins at the registry of deeds in the county where the land lies. It is common for a conveyancing attorney to use the services of a title abstractor to search the records at the registry and provide the conveyancing attorney with copies of the deeds, mortgages, and other instruments pertaining to the real estate.

12. Massachusetts has two independent systems of land record-keeping. The first is the registered land system, which is a Torrens-type system under the control of the Land Court and implemented by separate local officials in each county's registry of deeds. The second is the unregistered land system which is managed entirely by the local registries of deeds of each county. Property is generally either registered land or unregistered land, though it can sometimes consist of a combination of both.

13. Working backwards from the deed to the present owner, the conveyancing attorney must go back, step by step, conveyance by conveyance, to a deed that the conveyancing attorney determines is good on its face and which is a sufficient starting point. Where the transaction involves the sale of residential real estate, Massachusetts law requires that the attorney's title examination must extend at least fifty years back from the earliest deed which on its face does not suggest a defect in the title. G.L. c. 93, § 70. Using that deed as the starting point, and the grantor indices at the registry of deeds, the conveyancing attorney then "runs" the title from that grantor forward.

14. The indices are reviewed to find every deed from every grantor in the chain of title and other instruments conveying an interest in the property, any and all adverse titles or claims, all liens, charges, encumbrances, including judgments against any person during the period the law makes them a lien on land, taxes, special assessments, and statutory liens, and every other matter or thing appearing of

record that may affect, implicate or impair the title. This process is repeated for successive owners up to the present time. If the property has passed by will instead of by deed, the title search must include a search of the records at the registry of probate.

15. The examination of the documents found at the registry of deeds may disclose any number of clouds or encumbrances on the title to the real estate, including access easements, attachments, bankruptcy filings, condominium issues, inaccurate descriptions in a deed, improper discharges of mortgages, the pendency of divorce proceedings, utility easements, executions, homesteads, leases, lis pendens, mechanics' liens, mortgage foreclosures, or tax liens, among many others.

16. It is not possible to list here all the myriad problems that can be found from a title examination. There are a number of title defects and encumbrances that may be identified as routine, such as the identification of outstanding mortgages that need to be discharged, but many are more complex and require a substantive knowledge of Massachusetts real estate law.

17. The results of the title search may require the conveyancing attorney to investigate public documents filed at the town or city hall, including zoning maps and assessor's records.

- **Conveyancing Attorney Assesses Off-Record Title Matters.**

18. In addition to reviewing title documents recorded at the registry of deeds and other public records, the lender's conveyancing attorney may be required to review off-record matters to ensure that the lender's interest in the property will be protected.

19. Depending on the particulars of the property, the conveyancing attorney may be required to evaluate and to ensure that (a) the property is not located in a flood plain zone, or, if it is, flood insurance can be obtained; (b) all improvements to the structures of the property are located within the boundary lines of the property and comply with zoning dimensional requirements contained in the by-laws of the town or city; (c) the property complies with Title V of the State Environmental Code (310

C.M.R. 15.301); (d) orders of condition issued by a local conservation commission, if any, are complied with; and (e) all real estate taxes, betterments, and other municipal charges that are due and payable have been paid, and that there are no other outstanding municipal charges.

B. The Resolution Of Any Title Defect Or Cloud Identified By The Title Examination And The Determination That The Defect Or Cloud Has Been Properly Resolved.

20. When the conveyancing attorney's title examination reveals an existing defect or cloud on the title to the property interest being conveyed, either the seller will not be able to convey a "good and clear record and marketable title" or the mortgagor will not be able to provide the lender with a valid mortgage lien. Therefore, the defect or cloud must be removed or otherwise resolved in order for the parties to satisfy their contractual obligations to one another.

21. Having identified the title defect or cloud that prevents one of the parties from satisfying his contractual obligations to convey the requisite quality of title, the conveyancing attorney makes a further judgment as to the proper application of curative statutes and/or title standards to address the defect.

22. In some instances, the defect or cloud can be resolved easily. For example, with respect to an existing unpaid mortgage, the conveyancing attorney will use part of the loan proceeds to payoff the mortgage and obtain a discharge. Where the mortgage has already been paid off, but a discharge is missing, the conveyancing attorney will contact the responsible party and make arrangements, through holdbacks and indemnifications, to obtain a discharge. See, e.g., G.L. c. 183, § 53B (discharge of mortgage by note holder); G.L. c. 183, § 53C (discharge of mortgage by mortgage servicer or note holder who is not the holder of record).

23. There are innumerable title problems that cannot be resolved and require the intervention of the Massachusetts Superior Court or Land Court under Chapter 240 of the General Laws. Such judicial actions would be necessary to resolve the validity of certain encumbrances, G.L. c. 240, §§ 11-

14A, the discharge of certain mortgages, G.L. c. 240, § 15, the enforceability of equitable restrictions, G.L. c. 240, §§ 16-18, the determination of boundaries of flats, G.L. c. 240, §§ 19-26, questions regarding a fiduciary's power to convey real estate, G.L. c. 240, §§ 27-28, or other actions necessary to quiet or establish title to real estate, G.L. c. 240, §§ 6-10C.

24. Regardless of whether the curative action is taken by the conveyancing attorney or by another person, the conveyancing attorney has the obligation to determine whether the action taken was sufficient under the law and that the parties to the real estate transaction are able to transfer the quality of title specified in their agreements.

C. The Settlement Or "Closing" Of The Transaction.

25. After the review of the title and any curative action, if the conveyancing attorney determines that the parties are able to transfer the quality of title specified in their agreements, she prepares to conduct the settlement of the real estate transaction. The settlement, which is sometimes referred to as the "closing," refers to that portion of the conveyance at which the parties meet, execute the necessary documents to effect the conveyance, and exchange the consideration required by their agreements.

• **Drafting And Execution Of Title And Loan Documents.**

26. In advance of the settlement, the conveyancing attorney receives from the lender, or himself prepares, a package of documents to be executed by the parties, including the note and mortgage. These documents typically need legal descriptions added to make them acceptable for recording. Many of these documents are required by the secondary mortgage market and others are required by Massachusetts law.

27. Depending on whether the transaction is a purchase or a refinance, the documents ordinarily include the application for the mortgage loan, the acceptance of the mortgage commitment, an

agreement between the buyer and seller as to the adjustment of property taxes, an affidavit of owner occupancy, a notice of the lead paint law provisions and a release of the lender from liability for any violations (G.L. c. 111, §§ 190-99 and 105 C.M.R. 460.00 et seq.), a smoke detector certification agreement (G.L. c. 148, §§ 26E and 26F), a certificate regarding the presence of an approved carbon monoxide alarm in conformance with the requirements of the board of fire prevention regulations (G.L. c. 148, § 26F1/2), a certificate of nonforeign status (Section 1445 of the Internal Revenue Code), an affidavit of the seller to permit the lender to obtain title insurance without exceptions for mechanics liens and persons in possession, the truth-in-lending disclosure statement required by Regulation Z (15 U.S.C.A. §§ 1601-1638), a disclosure of the lender's intent concerning the assignment of servicing of the mortgage loan (12 U.S.C.A. § 2605(a)), a notice of the three-day right to rescind (15 U.S.C. § 1635) (only applies to mortgage refinances), the promissory note, and the mortgage with any applicable riders. There may be additional loan documents depending on a number of factors, such as whether the home being purchased is new construction, whether the property is a condominium or co-op, and how title to the property is held.

28. In addition to the loan documents listed above, the conveyancing attorney prepares a settlement statement which accounts for the proceeds of the transaction. For all federally regulated mortgage loans, the conveyancing attorney is required as the "settlement agent" to complete a Uniform Settlement Statement provided for under Regulation X, codified at 24 C.F.R. 350. The Settlement Statement identifies the collection and disbursement of the funds in conformity with the parties' respective contractual obligations, including any necessary adjustments relating to collected rents, mortgage interest, prepaid premiums on insurance, if assigned, water and sewer charges, operating expenses (if any), and taxes. In order to prepare the Settlement Statement accurately, the conveyancing attorney reviews the parties' Purchase and Sale agreement and any other documents containing the financial terms of the parties' agreements.

29. At the settlement, the conveyancing attorney is not a passive observer but is the individual who orchestrates it and directs the actions of the parties. She supervises the settlement of the transaction to ensure that the appropriate legal documents have been validly executed and that the parties' contractual obligations to one another have been fulfilled.

30. As part of the settlement of the transaction, the conveyancing attorney also reviews and passes on all title documents. Specifically, where the transaction involves a purchase of property, the conveyancing attorney reviews the deed provided by the seller to ensure that it conforms to the terms of the parties' Purchase and Sale agreement, contains the correct description, and that it is properly dated, signed and acknowledged. In addition, there are a number of statutes that specify various requirements that must be satisfied to make the deed and other title documents acceptable for recording, e.g., G.L. c. 183, § 6 (deed must contain a recital of the full consideration paid for the property). The deed is also reviewed for compliance with deed indexing standards imposed by the registries.

31. In both a purchase transaction and a refinance, the conveyancing attorney also ensures that all the requirements specified in the mortgage commitment have been satisfied and all contractual obligations between the parties have been met so that the title to the real estate may be validly conveyed to the buyer (in a purchase transaction) and the lender, thereby, may receive a valid mortgage interest.

32. Following execution by the buyers and sellers, the conveyancing attorney then executes the Uniform Settlement Statement and certifies that the information shown therein is accurate and that disbursement of the funds will be made in accordance with the Statement. Any failure to truthfully and accurately record the disbursements on the Statement constitutes a violation of 18 U.S.C.A. § 1001 and subjects the conveyancing attorney to criminal penalties.

- **Explanation Of Documents And Legal Obligations.**

33. Whether the transaction is a purchase of residential real estate or a refinance of an existing mortgage, the parties almost always have questions at the settlement regarding the significant

number of loan documents they are executing, the disbursement of the funds as reflected in the Settlement Statement, the mortgage obligations, and other matters regarding the transaction.

D. The Decision To Disburse The Mortgage Proceeds And To Record The Title Documents At The Registry Of Deeds.

34. At the conclusion of the settlement, the deed and the mortgage are entrusted to the conveyancing attorney. While the execution and delivery of the deed is sufficient to transfer the property interest between grantor and grantee, the conveyance is not deemed complete until the documents of title are recorded at the registry of deeds.

35. The conveyancing attorney performs a final run-down of the title at the registry of deeds to ensure that the status of the title has not changed. If the conveyancing attorney determines that there have been no changes in the status of the title, she records the deed, the mortgage, and any other documents necessary to establish the parties' legal rights in the real property.

36. After the deed and mortgage are recorded, the conveyancing attorney disburses the loan proceeds in accordance with the Uniform Settlement Statement. Disbursements may include the paying outstanding real estate taxes, satisfying outstanding mortgages, paying recording fees and deed stamp taxes, and paying broker's commissions and charges.

II. TITLE INSURANCE

37. Title insurance, which insures the status of record title at a particular point in time, is necessarily based on a thorough title examination to ascertain that status of record title and to identify any, defects, liens or encumbrances existing as of the date and time of recording.

38. There are two basic types of title insurance policies: (a) an owner's policy which insures the interests of the purchaser or owner of real estate; and (b) a lender's policy which insures the interests of the mortgage lender. Both the owner's policy and the lender's policy are designed to insure the status of record title to the real property as of the date and time of recording.

39. The typical owner's policy assures a purchaser that the legal title to the property is properly vested in that purchaser and that the title is free from all defects, liens and encumbrances except those which are listed as exceptions in the policy or are excluded from the scope of the policy's coverage. The typical lender's policy is similar to the owner's policy but the lender's policy insures the legal validity and enforceability of the lien of the mortgage. Additional coverages can be added or deleted to both forms of policy with endorsements that extend to a variety of common issues.

40. In Massachusetts, the title insurance companies do not themselves examine the status of title to the real property being insured. Instead, the policy is issued by the conveyancing attorney, who is an agent for one or more of the title insurance companies. The policy is based on her title examination.

41. In accordance with the underwriting guidelines of the title insurer, and based on a review of the title, as described above, the conveyancing attorney makes a determination as to the "quality of title." Whether the conveyancing attorney will issue a particular policy depends on her evaluation of the status of the title to the real estate and her determination regarding the defects, liens or encumbrances that impair the title. Such defects, liens or encumbrances may be noted as exceptions to coverage. The determination as to which defects or encumbrances to identify as exceptions, which do not affect the use and enjoyment of the insured property, and which should be reported to the title insurance company and the parties to the transaction, are all decisions made by the conveyancing attorney.

42. When the conveyancing attorney determines that the "quality of title" disclosed by her examination and in light of *in rem* state and federal law is acceptable and that a legally valid interest in the property has been conveyed to the lender, he issues a title insurance policy. The decision to issue or not to issue a particular title insurance policy is ordinarily made by the conveyancing attorney based on this review and not by the title insurance company directly. The title insurer does not control the manner in which the title insurance agent determines the "quality of title." For these reasons, title insurance companies operating in Massachusetts expect their agents who make decisions about issuing title policies

in Massachusetts to have a professionally reliable knowledge of Massachusetts real estate law.

III. BACKGROUND AND EXPERIENCE

43. I am a graduate of Boston College, with a Bachelor of Arts, magna cum laude, in 1974. I am also a graduate of the University of Miami Law School, with a Juris Doctor in 1977. I have practiced law since my graduation, was admitted to the Massachusetts Bar in 1978, and for the past thirty (30) years have focused my practice on real estate law.

44. I have practiced in small and large law firms, and as an in-house counsel. Between 1979-1985, I worked as a title attorney at Lawyers Title Insurance Corporation in Boston where I was heavily involved with the negotiation of title insurance coverage on residential and commercial real estate. I also served as an Adjunct Professor of Real Estate Law at Boston University Metropolitan College from 1988-1997. I have been practicing real estate law at Kopelman and Paige since 1997 representing municipalities in real estate sales and acquisitions.

45. I did my first residential closing in 1979 and have continued to represent buyers, sellers and lenders in residential purchase transactions, as well as refinancing. Over my 30 year career, I estimate that I have been involved in thousands of residential real estate transactions, including condominium units, single family houses and multifamily properties.

46. I served as the Chairperson of the Property Law Section of the Massachusetts Bar Association between 2003 and 2006. I am also a member of REBA, and served as its President in 2001. I also served on the Governor's Task Force with respect to Chapter 40B (affordable housing) in Massachusetts. I am a member of The Abstract Club, an organization that is over 100 years old, with limited membership, whose purposes are "the encouragement of the knowledge and practice of real estate law ... and the improvement of the laws of the Commonwealth."

47. I am the editor of two MCLE publications: *Massachusetts Real Estate Law Sourcebook and Citor* (2008) in which I wrote the chapter on recent Massachusetts real estate cases, and *Handling*

Residential Real Estate in Massachusetts. I am a frequent lecturer for legal continuing education programs on complex title issues, tax titles, affordable housing, eminent domain and smart growth zoning. I was a contributor to *Examining and Evaluating Title to Real Property in Massachusetts*, PESI, 2003.

48. Further, I have been qualified as an expert witness and have testified in the following case: *Marilyn Kunelius v. Town of Stow, et al.*, United States District Court (District of Massachusetts), C.A. No. 05-11697-GAO.

Signed under the pains and penalties of perjury this 12th day of December 2008

/s/ Kathleen M. O'Donnell

Kathleen M. O'Donnell