

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

<hr/>		)	
THE REAL ESTATE BAR ASSOCIATION		)	
FOR MASSACHUSETTS, INC.,		)	
		)	
Plaintiff,		)	
v.		)	C.A. No. 07-10224-JLT
		)	
NATIONAL REAL ESTATE INFORMATION		)	
SERVICES, INC. and NATIONAL REAL		)	
ESTATE INFORMATION SERVICES, L.P.,		)	
		)	
Defendants.		)	
<hr/>		)	

**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO  
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT AND IN  
SUPPORT OF PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT**

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Dated: December 12, 2008

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<u>Mass. Conveyancers’ Ass’n, Inc. v. Colonial Title &amp; Escrow, Inc.</u> , 13 Mass. L. Rptr. 633, 2001 WL 669280 (Mass. Super. 2001). . . . .	1, 2, 11, 13, 15, 17, 26, 27
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<u>Private Lending &amp; Purchasing, Inc. v. First Am. Title Ins. Co.</u> , 54 Mass. App. Ct. 532 (2002).. . . . .	17, 24
<u>Pulse v. North Am. Land Title Co.</u> , 218 Mont. 275, 707 P.2d 1105 (1985).. . . . .	16
<u>R.I. Bar Ass’n v. Automobile Service Ass’n</u> , 55 R.I. 122, 179 A. 139 (1935).. . . . .	6
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<u>State Bar Ass’n v. Connecticut Bank &amp; Trust Co.</u> , 140 A.2d 863 (Conn. 1958). . . . .	23
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<u>Statewide Grievance Comm. v. Patton</u> , 239 Conn. 251, 683 A.2d 1359 (1996).. . . . .	16
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<u>West Virginia State Bar v. Earley</u> , 144 W.Va. 504, 109 S.E.2d 420 (1959) . . . . .	23
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Alfred L. Eno, Jr. <i>et al.</i> , 28 Mass. Practice: Real Estate Law § 2.1 (3d ed. 1995). . . . .	32
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Arthur L. Eno, Jr., <i>et al.</i> , 28 Mass. Practice: Real Estate Law (West Group 2004). . . . .	7, 24, 28
Caryl A. Yzenbaard, Residential Real Estate Transactions (1991).....	24
Dennis P. Powers, <i>et al.</i> , How to Handle a Residential Real Estate Closing (Mass. Bar Institute 2003). . . . .	7
Francis T. Talty, <i>et al.</i> , 5 Mass. Practice: Methods of Practice, (West Group 2000). . . . .	7
Gayle Stone-Turesky, <i>et al.</i> , Residential Real Estate Basics: From Offer to Closing (MCLE 1996).....	7
Howard J. Alperin and Lawrence D. Shubow, 14C Mass. Practice: Summary of Basic Law § 17.112 (3d ed.). . . . .	33
Joint Letter of United States Department of Justice and Federal Trade Commission dated December 20, 2002 regarding the American Bar Association’s proposed Model Definition of the Practice of Law at <a href="http://www.ftc.gov/opa/2002/12/lettertoaba.htm">http:// www.ftc.gov/opa/2002/12/lettertoaba.htm</a> .....	5
Joyce D. Palomar, Bank Control of Title Insurance Companies: Perils to the Public that Bank Regulators have Ignored, 44 Sw. L.J. 905 (Fall 1990).....	26
Kathleen M. O’Donnell, <i>et al.</i> , Handling Residential Real Estate Transactions in Massachusetts (MCLE 2000). . . . .	7
Kathleen M. O’Donnell, Massachusetts Real Estate Law Sourcebook (MCLE 2007).....	7
Lynne Murphy Breen, <i>et al.</i> , Representing Lenders in Residential Transactions: Step-by-Step, Practical Advice (MCLE 2004). . . . .	7
Massachusetts Division of Banks Opinion 98-135. . . . .	35
Peter Butt, Land Law 7 (2 <sup>d</sup> ed. 1988).....	6
Peter M. Heintzelman, <i>et al.</i> , Handling Residential Condo and Multi-Family Transactions: A Step-by-Step Guide (MCLE 1998). . . . .	7
Robert E. Megarry & M.P. Thompson, A Manual of the Law of Real Property 125 (6 <sup>th</sup> ed. 1993).....	6

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Ruth A. Dillingham, <i>et al.</i> , How To Search a Residential Real Estate Title: A Practical Introduction to Title Abstracting (MCLE 2005) . . . . .	7
Ward P. Graham, <i>et al.</i> , Residential and Commercial Title Insurance: What It Is, What It Does and How It Works (MCLE 2004) . . . . .	7, 25, 28
William V. Hovey, <i>et al.</i> , Massachusetts Nuts & Bolts of Residential Real Estate Transactions (Professional Education Systems, Inc. 1998) . . . . .	7

## INTRODUCTION

The Plaintiff Real Estate Bar Association for Massachusetts, Inc. (“REBA”) submits this Memorandum of Law in Opposition to the Defendants’ Motion for Summary Judgment and In Support of REBA’ Cross-Motion for Summary Judgment. The facts supporting REBA’s Opposition and Cross-Motion are fully set forth in its Rule 56.1 Statement and in the Affidavits of Kathleen M. O’Donnell, Esq. and Lawrence R. Kulig, Esq., filed herewith.

## SUMMARY OF ARGUMENT

- **Conveyancing Is The Practice Of Law (pages 3 - 19).**

Since 1935, Massachusetts courts have held that the process of conveying a legal interest in real property is the practice of law. In re Opinion of the Justices, 289 Mass. 607, 613 (1935) (practice of law “embraces conveyancing”); Massachusetts Ass’n of Bank Counsel, Inc. v. Closings, Ltd., 1 Mass. L. Rptr. 87, 1993 WL 818916 (Mass. Super. 1993) (“practice of law in Massachusetts includes the handling of residential real estate conveyancing”); Mass. Conveyancers Ass’n, Inc. v. Colonial Title & Escrow, Inc., 13 Mass. L. Rptr. 633, 2001 WL 669280 (Mass. Super. 2001) (“Conveyancing, which refers to the various functions concerning the creation, transfer and termination of an interest in real property, constitutes the practice of law”); Real Estate Bar Ass’n for Mass., Inc. v. Trainor, C.A. No. SUCV2006-04633, slip op. (Mass. Super. Aug. 8, 2008) (same).

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. It is the practice of law because it necessarily depends on a series of interconnected judgments as to the legal rights and obligations of others. There must be an initial judgment that the seller or mortgagor actually possesses what he purports to possess. Any defects in that legal title must be discerned from the title examination and appropriately resolved. There must be

a further judgment that the appropriate legal documents have been validly executed at the settlement or “closing” of the transaction, that the promised consideration for the property has been exchanged, and that the parties’ contractual obligations to one another have been fulfilled. Finally, there must be a concluding judgment, premised on the foregoing, that the appropriate documents necessary to create the various valid legal interests in the property have been recorded at the registry of deeds.

Because a proper conveyance of property requires knowledge and application of real estate law, parties to real estate transactions have historically entrusted attorneys to undertake the conveyance. To assure the parties to the real estate transaction that title to the property and their respective legal interests in that title have been legally conveyed, the conveyancing attorney must control or supervise all the aspects of this process.

**• Issuance Of Title Insurance By Title Agents Is The Practice Of Law (pages 24 - 28).**

Virtually all transactions that are financed by mortgage loans also require title insurance policies. The issuance of a title insurance policy is predicated on the title examination that is performed for the conveyance, Colonial Title & Escrow, Inc., 13 Mass. L. Rptr. 633, 2001 WL 669280 at \*4, and requires the same legal skills and acumen needed for the conveyance. Consequently, Massachusetts courts have also held that the activities of a title agent constitute the practice of law. Id.

**• Defendants’ Activities Constitute The Unauthorized Practice of Law (pages 19 - 23).**

Defendant National Real Estate Information Services, Inc. (“NREIS”) is a for-profit corporation based in Pittsburgh and is not licensed to practice law. Nevertheless, NREIS has contracted with various banks and lenders to control and supervise the entire conveyancing process by which their mortgages are secured by residential real estate in Massachusetts and to issue title insurance based, apparently, on title examinations by non-attorneys. In order to appear to comply with Massachusetts law, NREIS engages attorneys to participate in only one aspect of the conveyance – the settlement or “closing” of the

transaction. Even then, NREIS divests the attorneys of virtually all responsibility for the conveyances and requires that they do nothing more than witness the execution of the closing documents. In essence, the attorneys are engaged to act as notaries public with all of the other conveyancing activities undertaken by NREIS or other non-attorneys.

As demonstrated below, Plaintiff REBA is entitled to a declaratory judgment that when a non-lawyer, like NREIS, conducts or controls all of the activities of a residential real estate closing, and retains an attorney simply to witness the execution of documents at the settlement, it is engaged in the unauthorized practice of law in violation of G.L. c. 221, §§ 46 and 46A. Furthermore, the Court should deny the Defendant's Motion for Summary Judgment since Massachusetts law plainly provides that only an attorney may undertake the activities that constitute a conveyance of real property.

**I. THE PRACTICE OF LAW IS THE APPLICATION OF THE LAW TO EVALUATE, 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 Commonwealth, 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 the general body and philosophy of jurisprudence to evaluate, alter or protect a client's rights under the law. E.g., Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 180 (1943) (practice of law embraces activities that require the professional judgment of a lawyer); In re Shoe Mfrs. Protective Ass'n, Inc., 295 Mass. 369, 372 (1936) (same). 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"). The legal profession, which serves as the bridge between the law of the Commonwealth and its citizens, "is public in its nature and

intimately connected with the highest functions of the State.” In re Keenan, 314 Mass. 544, 546-47 (1943). Without lawyers, the benefits, protections and obligations of the law would be largely inaccessible.

The Commonwealth has an exceptionally strong interest<sup>1</sup> in ensuring that the privilege of advising its citizens as to their legal rights and acting to secure those rights is conducted by those persons “worthy of trust and confidence in matters pertaining to the law.” In re Bergeron, 220 Mass. 472, 477 (1915). Only those who meet rigorous educational requirements, have demonstrated a thorough knowledge of the law by passing a rigorous bar examination, and have been certified of honest demeanor and good moral character are permitted to practice law. After having been admitted to the bar, these individuals are subject to the ongoing and direct oversight of the judiciary to ensure that they maintain high intellectual and moral standards. Lowell Bar Ass’n, 315 Mass. at 180 (those permitted to advise and represent others as to matters affecting their legal rights are properly “held to a high standard of honor and of ethical conduct”). The basis for excluding all others from the practice of law “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.” Id.

Because the law itself is constantly changing, a comprehensive listing of activities that can only be undertaken by lawyers and no one else is, as a practical matter, “impossible.” In re Shoe Mfrs. Protective Ass’n, 295 Mass. at 372. See also In re Bergeron, 220 Mass. at 476-77 (“It is impracticable to

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<sup>1</sup> The Supreme Court has observed the States’ interest in regulating the practice of law is “substantial” and “compelling.” Fla. Bar v. Went For It, Inc., 515 U.S. 618, 625, 115 S.Ct. 2371, 132 L.Ed.2d 541 (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, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). See also In re Lyon, 301 Mass. 30, 34 (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”).

attempt to name the matters about which [those who practice law] may be asked to act. Stated comprehensively they include the liberty, the property, the happiness, the character and the life of any citizen or alien”); Opinion of the Justices, 289 Mass. at 613 (the “practice of law” is not static and must evolve as society progresses); Lowell Bar Ass’n, 315 Mass. at 180 (because the law “pervades all human affairs,” it is “not easy” to define more specifically the profession that relates the general body and philosophy of the law to a client’s specific legal problem). While some, most notably, the United States Department of Justice and the Federal Trade Commission, have suggested that the practice of law is an “amorphous concept” with “unclear” boundaries, it is actually the concept of the “law” they find to be “amorphous” and “unclear.” See Joint Letter of United States Department of Justice and Federal Trade Commission dated December 20, 2002 at <http://www.ftc.gov/opa/2002/12/lettertoaba.htm>. Whether a particular activity may be undertaken only by a lawyer depends on whether the activity requires an understanding and application of the law or legal principles to reach a client’s objectives, 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.

Of course, merely because an activity involves an element of the law does not, by itself, render the activity the practice of law. Because of the ubiquitousness of the law, most occupations necessitate some understanding of the law. An activity that involves some aspect of the law may be performed by a non-lawyer for another if it is merely incidental to an occupation that is “universally recognized as distinct from the practice of law.” Lowell Bar Ass’n, 315 Mass. at 181. One method to determine if an occupation is “universally recognized as distinct” from the practice of law is to review the 820 occupations organized by the United States Department of Labor in its Standard Occupational Classification (SOC) System. Presently, there is no separate occupation identified in the SOC System for a person that closes residential real estate loans. (The SOC System is available online at [www.bls.gov/soc/home.htm](http://www.bls.gov/soc/home.htm)).

## II. CONVEYANCING IS THE PRACTICE OF LAW.

Although a comprehensive listing of activities which constitute the practice of law may be impractical, it is now well-established in Massachusetts that conveyancing is the practice of law and can only be undertaken on behalf of another by a duly qualified and licensed attorney. This issue had been beyond dispute since a 1935 Supreme Judicial Court decision in which the Court found that the practice of law “embraces conveyancing.” Opinion of the Justices, 289 Mass. at 613. See also Bump v. District Court of Polk County, 232 Iowa 623, 637, 5 N.W.2d 914, 921 (1942) (“practice of law ... includes conveyancing”); Howton v. Morrow, 269 Ky. 1, 3, 106 S.W.2d 81, 82 (1937) (practice of law embraces conveyancing); People v. Alfani, 227 N.Y. 334, 337-38, 125 N.E. 671, 672 (1919) (“According to the generally understood definition of the practice of law in this country, it embraces ... conveyancing”); Dayton Supply & Tool Co., Inc. v. Montgomery Cty. Bd. of Revision, 111 Ohio St.3d 367, 369, 856 N.E.2d 926, 929 (2006) (“The practice of law is not limited to the conduct of cases in court. It embraces ... conveyancing”) (citations omitted); R.I. Bar Ass’n v. Automobile Service Ass’n, 55 R.I. 122, 134, 179 A. 139, 144 (1935) (practice of law embraces conveyancing); In re Duncan, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909) (“It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces ... conveyancing”); In re Ripley, 109 Vt. 83, 86, 191 A. 918, 919 (1937) (practice of law embraces conveyancing); 5 Am.Jur. 262 § 2 (“The practice of law is not limited to the conduct of cases or litigation in court; it embraces ... conveyancing”).

Conveyancing is “the application of the law of real property in practice,” Robert E. Megarry & M.P. Thompson, A Manual of the Law of Real Property 125 (6<sup>th</sup> ed. 1993), and is a short-hand way to refer to that continuous, interconnected series judgments and activities that must be performed in order to convey a legal interest in real estate to consummate a transaction (1) between a buyer and seller, or (2) between a borrower and a lender. E.g., Peter Butt, Land Law 7 (2<sup>d</sup> ed. 1988) (“Conveyancing is the

art or science of preparing documents and investigating title in connection with the creation and assurance of interests in land”). It includes (a) the review of the legal title to the property to ensure that the seller has good, clear and marketable title to the property, (b) the supervision of the process by which any title issues or encumbrances are resolved, (c) controlling the settlement or “closing” of the real estate transaction to ensure that the appropriate legal documents are properly executed, the consideration for the property exchanged, and the parties’ obligations to one another are fulfilled, and (d) recording the appropriate documents to create the various interests in the property.<sup>2</sup> Together, these activities constitute a conveyance of real estate.

It is not insignificant that conveyancing in Massachusetts has traditionally been conducted by attorneys. As a practical matter, one of the tests that courts often use to decide whether an activity is the practice of law is to determine whether that activity 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 (the “customary functions of attorney” constitute practice of law); Lowell Bar Ass’n, 315 Mass. at 186 (“The

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<sup>2</sup> This description is necessarily an over-simplified summary of the extensive legal work involved in closing a residential real estate transaction on behalf of a lender. A number of treatises provide a more complete account of the extensive amount of legal work involved in completing a residential real estate transaction. See, e.g., Francis T. Talty, et al., 5 Mass. Practice: Methods of Practice, (West Group 2000) (Chapters 5 through 9 devoted to aspects of residential real estate closings); Arthur L. Eno, Jr., et al., 28 Mass. Practice: Real Estate Law (West Group 2004) (Chapters 28 through 31 devoted to aspects of residential real estate closings); Kathleen M. O’Donnell, et al., Handling Residential Real Estate Transactions in Massachusetts (MCLE 2000) (two volumes); Lynne Murphy Breen, et al., Representing Lenders in Residential Transactions: Step-by-Step, Practical Advice (MCLE 2004); Dennis P. Powers, et al., How to Handle a Residential Real Estate Closing (Mass. Bar Institute 2003); Peter M. Heintzelman, et al., Handling Residential Condo and Multi-Family Transactions: A Step-by-Step Guide (MCLE 1998); William V. Hovey, et al., Massachusetts Nuts & Bolts of Residential Real Estate Transactions (Professional Education Systems, Inc. 1998); Gayle Stone-Turesky, et al., Residential Real Estate Basics: From Offer to Closing (MCLE 1996); Ward P. Graham, et al., Residential and Commercial Title Insurance: What It Is, What It Does and How It Works (MCLE 2004); Ruth A. Dillingham, et al., How To Search a Residential Real Estate Title: A Practical Introduction to Title Abstracting (MCLE 2005). See also Kathleen M. O’Donnell, Massachusetts Real Estate Law Sourcebook (MCLE 2007) (compilation of federal and state statutes and regulations affecting real estate).

actual practices of the community have an important bearing on the scope of the practice of law”). See also State Bar of Ariz. v. Ariz. Land Title & Trust Co., 90 Ariz. 76, 87, 366 P.2d 1, 9 (1961) (“We believe it sufficient to state that those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries must constitute ‘the practice of law’”).

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 parties’ various agreements are described more fully below. The conveyancing attorney must ensure that the seller possesses, and can validly transfer to the buyer, a “good and clear record and marketable” title to the real estate. Because Massachusetts is a so-called “title theory state,” the conveyancing attorney must ensure that the lender will also acquire “good and clear record and marketable” title to the real estate securing its loan. Also, the conveyancing attorney must ensure that the lender will be able to perfect a valid mortgage interest in the real estate being purchased. The necessary activities are substantially the same whether the transaction involves the purchase of real estate or the refinancing of an existing mortgage. As these activities necessarily involve judgments as to the rights and obligations of others under the law, it is in the public interest that conveyancing be performed only by persons who have been trained in the law, who have demonstrated a proficiency in the law by passing the bar entrance examination, who have been licensed by the Commonwealth, and who remain subject to the continuing oversight of the Board of Bar Overseers and the jurisdiction of the Courts of the Commonwealth.

As outlined below, 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 interest in the real property that he purports to possess. Second, if there are any flaws in his legal title, they must be resolved. Third, the legal documents and promised consideration necessary to transfer the 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 valid legal interests in the property must be recorded at the registry of deeds.

**A. The Assessment Of The Status Of The Existing Title To The Real Property Being Conveyed Involves A Legal Judgment And Is The Practice Of Law.**

Initially, after the lender notifies its conveyancing attorney of its intent to make a mortgage loan, the conveyancing attorney conducts a review of the title to the real property that will secure the loan. Whether the transaction is a purchase or a refinance, the primary purpose of the conveyancing attorney's review is to ensure that the mortgagor has valid legal title to the property and that there are no defects or clouds on the title so that the lender's lien can be perfected. However, both the homebuyer and seller, or the mortgagor in the case of a refinance, have an equally strong interest in ensuring that the legal title to the property is free of any defects or clouds and these parties rely on the assessment of title conducted by the lender's conveyancing attorney.

In order to conduct this assessment, the conveyancing attorney reviews both record title matters and matters outside the record title. Significantly, though most registries now have on-line web sites that allow electronic searches of some of the documents recorded with them, there are many off-record documents that affect title to real estate that cannot be searched in this manner.

- **Lender's Conveyancing Attorney Assesses Record Title Matters.**

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 lender's 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. 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 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.

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.<sup>3</sup> 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. The indices are reviewed to find every deed from the grantor or other instrument 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.

The examination of these documents found at the registry of deeds 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 or other title documents, improper discharges of mortgages, the pendency of divorce proceedings, easements, executions, homesteads, leases, lis pendens, mechanics’ liens, mortgage foreclosures, uncertain powers of attorney, or tax liens, among others. 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 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.

Although most documents pertaining to real estate are recorded at the registry of deeds, depending on the property, the conveyancing attorney also may be required to review and evaluate public

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<sup>3</sup> As described below, 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.

documents filed at the probate court or at the town or city hall, documents prepared by registered land surveyors, and documents maintained by the tax assessor. Of course, it is also possible that any number of title problems could arise from one of these documents.

- **Lender's Conveyancing Attorney Assesses Off-Record Title Matters.**

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. 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 and other municipal charges that are due and payable have been paid, and there are no other outstanding municipal charges. The assessment of these and other similar matters also requires a substantive knowledge of Massachusetts real estate law.

Because the assessment of the title to the real property requires a legal assessment of all pertinent and applicable public and private records, court decisions, municipal ordinances and statutes from which a legal opinion as to the title to the property can be determined, it has long been held to be the practice of law. 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); In re Behenna, 92-72BD (Jan. 19, 1993) (O'Connor, J.) ("title examination, even without the rendering of advice, would constitute the practice of law"); In re Oates, No. 81-11BD (Aug. 6, 1986) (Liacos, J.) ("[T]itle searching its commonly perceived by the general public to be a pursuit, if not exclusively within the realm of the legal profession, closely associated with it"); Colonial Title & Escrow, Inc., 13 Mass. L. Rptr. 633, 2001

WL 669280 at \*8 (“[e]valuating 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” constitutes the practice of law); Town of Pembroke v. Gummerus, 2008 WL 2726524 (Mass. Land Ct., July 15, 2008) (“The decision about whether to accept or reject a title, or to insist on conditions to closing that address title concerns, . . . needs to be made strictly according to what the legal obligations of the seller to deliver title are, under the governing agreements and the law”). See also Doe v. McMaster, 355 S.C. 306, 313, 585 S.E.2d 773, 776 (2003) (title search constitutes the practice of law and must be conducted under supervision of a licensed attorney); Beach Abstract & Guaranty Co. v. Bar Ass’n, 230 Ark. 494, 501, 326 S.W.2d 900, 903 (1959) (title examination constitutes the practice of law).

**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 Removed Involves A Legal Judgment And Is The Practice Of Law.**

When the title examination reveals an existing defect or cloud on the title to the property interest being conveyed, it must ordinarily be removed or cured before the parties will go forward with the transaction. In some instances, the defect or cloud can be resolved by the conveyancing attorney directly. For instance, the conveyancing attorney may be able to use part of the loan proceeds to pay off an outstanding mortgage or attachment. In other situations, the buyer or the seller, the mortgagor, or other person may be required to take some action or to execute a document in order to resolve the issue.

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 since lay-persons are strictly prohibited from drafting for others documents that have legal significance. E.g., In re Shoe Mfrs. Protective Ass’n, 295 Mass. at 372 (corporation which completes legal documents for others in the course of conducting its collection business engages in the unauthorized practice of law). However, even where the title defect is purportedly cured by someone other than the conveyancing attorney, the conveyancing attorney must still review the resolution of the title issue to ensure that it is satisfactory under the law. Therefore, in all

instances, the conveyancing attorney is actively involved in the process of resolving any title issues.

Just as a substantive knowledge of Massachusetts law is required to identify the title defect or cloud, such knowledge is also required to resolve it or to validate the resolution undertaken by others to ensure that the title defect or cloud has been properly resolved under Massachusetts law. E.g., Goldblatt v. Corp. Counsel of Boston, 360 Mass. 660, 665 (1971) (in reviewing a Civil Service Commission appointment, the Court observed under Section 46 that “[o]nly an attorney may advise as to the legal ‘validity’ of tax titles”); Colonial Title & Escrow, Inc., 13 Mass. L. Rptr. 633, 2001 WL 669280 at \*8 (reviewing legal documents that affect title to real estate constitutes the practice of law).

**C. The Control And Supervision Of 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 Involves A Legal Judgment And Is The Practice Of Law.**

If the conveyancing attorney determines that the title to the property is satisfactory, the conveyancing attorney 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 contracts. At the settlement, the conveyancing attorney is not a passive observer but the individual who orchestrates it and directs the actions of the parties to the transaction.

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

In advance of the settlement, the conveyancing attorney receives from the lender, or himself prepares, a myriad number of loan documents to be executed by the parties. Many of these documents are required by the secondary market for mortgages and others are required by Massachusetts law. 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)), 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. Where the borrower is refinancing a mortgage, the borrower must also be provided with a notice of his right to rescind before the expiration of three business days. The lender's conveyancing attorney reviews these documents for accuracy and completeness in order to ensure that, if they are executed properly, they will provide the lender with a valid interest in the property.

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. In order to prepare the Settlement Statement accurately, the conveyancing attorney reviews the parties' Purchase and Sale agreement and any other documents containing the parties' agreements.

Where the transaction involves a purchase, the conveyancing attorney also makes any necessary adjustments as required by the parties' Purchase and Sale agreement relating 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 agreement, and taxes for the then current year. 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.

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' contract, contains the correct description, and that it is properly dated, signed and acknowledged. 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 property may be validly conveyed to the buyer (in a purchase transaction) and the lender, thereby, may receive a valid interest in the property. 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).

Seventy-five years ago, the Supreme Judicial Court held that the “drafting documents by which such rights are created, modified, surrendered or secured,” where a charge is rendered for such service, constitutes the practice of law. In re Shoe Mfrs. Protective Ass’n, 295 Mass. at 372 (corporation engages in the practice of law when it completes legal forms for others). Today, real estate law is certainly not less complex, and the “majority rule” is “that preparation or filling in blanks on preprinted legal forms

constitutes the practice of law.” In re Rankin, 320 B.R. 171, 184 (Bkrtcy. D. Mont. 2005). See, e.g., State Bar of Ariz., 90 Ariz. at 95-96, 366 P.2d at 14-15 (real estate agents and title insurance companies may not fill out standardized forms in land-sale transactions) (note subsequent change in Arizona state law through constitutional amendment); Statewide Grievance Comm. v. Patton, 239 Conn. 251, 254, 683 A.2d 1359, 1361 (1996) (court has “consistently held that the preparation of legal documents is commonly understood to be the practice of law”); Fla. Bar v. Miravalle, 761 So.2d 1049, 1051 (Fla. 2000) (court has “repeatedly held that the preparation of legal documents by a nonlawyer for another person to a greater extent than typing or writing information provided by the customer on a form constitutes the unlicensed practice of law”); State ex rel. Ind. State Bar Ass’n v. Ind. Real Estate Ass’n, 244 Ind. 214, 220, 191 N.E.2d 711, 715 (1963) (when filling in of blanks involves an act of great significance to parties involved, such practice should be restricted to members of legal profession); Pulse v. North Am. Land Title Co., 218 Mont. 275, 282, 707 P.2d 1105, 1109 (1985) (“drafting or filling in of blanks in printed forms of instruments dealing with land” constitutes the practice of law); State v. Buyers Serv., Co., 292 S.C. 426, 430, 357 S.E.2d 15, 17 (1987) (“Preparation of instruments, even with preprinted forms, involves more than a mere scrivener’s duties” and, therefore, constitutes the practice of law).

Often, many of the documents are drafted by the lender and not by the conveyancing attorney. Nevertheless, the lender expects the conveyancing attorney to review the documents to ensure that they are complete and correct. In addition, the conveyancing attorney is responsible for ensuring that the loan documents are executed properly with any necessary acknowledgments required by federal or state law. Even the decision whether or not a form must be completed potentially involves the practice of law because it is the lawyer’s training that equips him to recognize when a form is appropriate to use and when it must be altered to accomplish a client’s goals. Grievance Comm. of the Bar of Fairfield County v. Dacey, 154 Conn. 129, 141, 222 A.2d 339, 346 (1966) (“the determination that a given form should be followed without change is as much an exercise of legal judgment as is a determination that it should be

changed in given particulars. In either case, legal judgment is used in the adaptation of the form to the specific needs and situations of the client”). Cf. In re Bergeron, 220 Mass. at 476 (“every attorney ought to possess learning sufficient to enable him either to ascertain the law or to determine his limitations in that regard for the purpose of giving safe advice”).

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

Whether the transaction is a purchase or a refinance, the parties almost always have questions at the closing regarding the loan documents, the disbursement of the funds as reflected in the Settlement Statement, the mortgage obligations, and other matters regarding the transaction. Parties to the real estate transaction may look to “the lender’s legal representative ... for legal advice or explanation.” Colonial Title & Escrow, Inc., 13 Mass. L. Rptr. 633, 2001 WL 669280 at \*6. Furthermore, the lender expects that its conveyancing attorney, consistent with his fiduciary obligations to the lender, will explain the various loan documents to the parties and answer their questions. By doing so, the conveyancing attorney is, strictly speaking, not providing the parties with legal advice but simply assisting them, as the lender’s agent, to understand what it is they are signing. See Rule 4.3 of the Rules of Professional Conduct, Comment 1 (“Explaining the lawyer’s own view of the meaning of a contract, for example, does not involve the giving of ‘advice’ to an unrepresented person”).

The conveyancing attorney’s public obligations are distinct from his fiduciary obligations to his clients. However, his “obligation to the public is no less significant than that to the client.” In re Bergeron, 220 Mass. at 472. Importantly, in both instances, the attorney is engaged in the practice of law and subject to the ethical obligations set out in the Rules of Professional Conduct and the oversight of this Court. See also Private Lending & Purchasing, Inc. v. First Am. Title Ins. Co., 54 Mass. App. Ct. 532, 537 n.9 (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).

**D. The Decision To Disburse The Mortgage Proceeds And To Record The Title Documents Involves A Legal Judgment And Is The Practice Of Law.**

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’s possession. 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, in his judgment, there have been no changes in the status of the title, he records the deed, the mortgage, and any other documents necessary to establish the parties’ legal rights in the real property. Doe Law Firm v. Richardson, 371 S.C. 14, 18-19, 636 S.E.2d 866, 868 (2006) (“recording of documents is the ‘final phase’ of the real estate loan process and must be done under the supervision of an attorney”).

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. Based on his title examination, the conveyancing attorney must determine initially whether the deed and mortgage are recorded in the registered or unregistered sides of the registry. 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 (register of deeds will not accept a deed for recording unless in contains a recital of the full consideration paid for the property), as well as “deed indexing standards” imposed by the registries. As with the other aspects of the conveyancing process, the parties rely on the conveyancing attorney to properly record the deed and other title documents.

After the deed and mortgage are recorded, the conveyancing attorney disburses the loan proceeds in accordance with the Uniform Settlement Statement. 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. Once the appropriate documents are recorded and the payments made, the conveyancing attorney reports and transmits all documents to the lender.

**E. Although NREIS Acknowledges That It Is Not Authorized To Practice Law, NREIS Has Contracted With Lenders To Control And Supervise Conveyancing For Their Massachusetts Real Estate Transactions.**

NREIS provides conveyancing services to mortgage lenders directly or through its subcontractors, including title examinations, property evaluations, settlement services ("full closings" and "witness only" closings), preparation of the Uniform Settlement Statement, loan satisfaction document review, disbursement of mortgage loan proceeds, and recording services.

One of the services that NREIS purports to provide to its lender customers as part of a conveyance is a title examination of the real estate being conveyed. NREIS acknowledges that it is not qualified to make judgments about the status of the title. NREIS subcontracts this part of the conveyance to Connolly Title Services, Inc., which NREIS mistakenly believes is a Massachusetts law firm. NREIS relies on Connolly Title Services, Inc. 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."

However, contrary to NREIS's assumption, Connolly Title Services, Inc. is not a law firm and none of its employees is an attorney. Connolly Title Services, Inc. does not perform "any legal analysis or review" of the title documents and does not "give opinions" regarding them. Instead, Connolly Title Services, Inc. provides NREIS with title abstracts only and "basically reports what [it finds] of record in the registry of deeds." Consequently, no one connected with NREIS reviews the status of title for Massachusetts real estate transactions to ensure that the parties to the transaction actually possess – and can convey – the status of title that they are contractually obligated to convey.

With respect to the settlement portion of the conveyance, also known as the “closing,” NREIS chooses one of approximately seventy Massachusetts attorneys, who NREIS refers to as “signing agents,” from its “network” to attend the settlement. Apparently, NREIS believes that if it has an attorney attend the settlement it is in compliance with Massachusetts law that restricts conveyancing to attorneys. While this position evidences a profound misunderstanding as to the nature of a conveyance, it is also hypocritical because the attorneys that are sent to the settlement are more “signing agent” than attorney. The attorney 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. But see Executive Order No. 455, § 9(c) (“notary public who is not an attorney licensed to practice law in Massachusetts, or who is not directly supervised by an attorney, shall not conduct a real estate closing and shall not act as a real estate closing agent”). Following the settlement, the attorney returns the executed documents to NREIS and is paid for his services by NREIS.

For those real estate transactions that involve a purchase of real estate, the attorney retained by NREIS from its “network” is not involved in drafting a deed for the seller, which is clearly the practice of law. Instead NREIS subcontracts that service to a non-lawyer company located in Las Vegas, Nevada. Moreover, NREIS fails to provide any certifications of title to the buyer that are required under Massachusetts law, G.L. c. 93, § 70.

Once NREIS receives the executed loan documents from the attorney who attended the settlement, NREIS coordinates the recording of the mortgage and other relevant documents. NREIS also controls the payment of the mortgage proceeds that are due from its lender customer to the various parties to the transaction. NREIS does not disburse the funds to pay off prior mortgages or any other liens until after the new mortgage executed by the borrower has been recorded, which is a violation of

another state law, G.L. c. 183, § 63B.

**F. The Court Must Reject NREIS's Contention That A Conveyance Can Be Dissected Into Pieces In A Way That Transforms It Into An Act That Can Be Undertaken By A Person Not Trained In The Law.**

In light of the Supreme Judicial Court's 1935 decision, it cannot be disputed that conveyancing constitutes the practice of law and can only be undertaken by attorneys. As Defendant NREIS is not an attorney, it is obvious that NREIS cannot undertake conveyances on behalf of third parties. NREIS implicitly concedes this point since it has paid "lip service" to it by having Massachusetts attorneys attend the settlement of the real estate transactions and purporting to hire an attorney (who was actually a non-attorney) to conduct the title examinations. Nevertheless, NREIS has contractually agreed to perform the conveyances on behalf of a number of mortgage lenders, their customers, and the other parties to the relevant real estate transactions. NREIS contends that it is entitled to a judgment that there is no basis for the Plaintiff's request for an Order enjoining NREIS "from all activities by which an interest in real property is conveyed unless they are acting under the supervision and control of a Massachusetts attorney." NREIS asserts that the process of "conveyancing" can be dissected into discrete activities that can be performed by non-lawyers.

While any undertaking can be divided into component activities, that does not alter the fundamental nature of the undertaking itself. Indeed, much of the day-to-day work of any attorney includes activities (such as interviewing witnesses, reviewing documents, compiling factual information, drafting correspondence, etc.), that do not call for the attorney to apply his legal knowledge and training. Attorneys employ secretaries, paralegals, investigators, messengers, and other non-attorneys to perform many of these activities. The same is certainly true for conveyancing.

However, a conveyance of a legal interest in real estate is a singular event, notwithstanding that it is necessarily comprised of a series of interconnected judgments and activities that must be performed 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. The judgments identified above that are required to effectuate a conveyance are all interrelated and dependent on one another and cannot be outsourced. Moreover, in order for a conveyancing attorney to assure the potentially adverse parties to the real estate transaction that title to the property and their respective legal interests in that title have been properly conveyed, the conveyancing attorney must control or supervise the aspects of the process that affect the title.

The cases cited by NREIS do not support its assertions but do reinforce the Plaintiff’s arguments. For instance, as NREIS noted, the Supreme Judicial Court determined that conducting a title search without opining on the quality of the title is not the practice of law and may be performed by a lay-person. Opinion of the Justices, 289 Mass. at 613. The Plaintiff has never contended that the title searches, themselves, must be conducted by an attorney. However, in order to convey property there must be a determination of the status of title based on that search and that can only be performed by an attorney. The other cases cited by NREIS all held that an activity that involves some aspect of the law could be performed by a non-lawyer if the activity was incidental to an occupation “universally recognized as distinct from the practice of law.” The courts, in those instances, focus on the occupation, and not on the individual activities that were incidental to it. In this case, the Supreme Judicial Court has held that the occupation of “conveyancing” is the practice of law. Breaking a conveyance into “discrete steps” will not change the Court’s conclusion.

**G. The Fact That NREIS Retains Attorneys Confirms That NREIS Engaged In The Unauthorized Practice Of Law, Albeit Indirectly.**

NREIS’s practice of employing Massachusetts attorneys to attend the settlement of real estate transactions, and its apparent intent to employ Massachusetts attorneys to examine title, does not change the analysis above. The fact that a company like NREIS engages licensed attorneys is immaterial since “as [the company] 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, 652 (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 and charging its customers for those services provided by attorney); 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, 435 (1959) (“corporation or other lay agency can not practice law or hire lawyers to practice law for it”).

Furthermore, though NREIS has asserted a Counterclaim alleging a violation of the Dormant Commerce Clause, that does not preclude the entry of summary judgment for the Plaintiff. The Supreme Court has consistently upheld state regulatory statutes over Commerce Clause challenges:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 143 (1970) (citations omitted). NREIS cannot satisfy its heavy burden to show actionable discrimination in the application of the Commonwealth’s unauthorized practice of law statutes, G.L. c. 221 §§ 46 and 46A, since it is clear that the unauthorized practice of law statutes are even-handed and apply equally to all non-lawyers both those within and outside the state.

**III. BECAUSE TITLE INSURANCE IS PREMISED ON AN ASSESSMENT OF THE STATUS OF TITLE, IT IS THE PRACTICE OF LAW AND THE AGENTS WHO CONDUCT THE ASSESSMENT AND ISSUE TITLE INSURANCE MUST BE ATTORNEYS.**

Title insurance is now a modern adjunct to most mortgage loan transactions. Arthur L. Eno, Jr., *et al.*, 28 Mass. Practice: Real Estate Law § 30.1 at 789 (West Group 2004). 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. 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 insures the legal validity and enforceability of the lien of the lender's mortgage. Additional coverages can also be added or deleted to both forms of policy with endorsements that extend to a variety of common issues.

**A. The Emergence Of The Secondary Mortgage Market – And Not Any Change To The Practice Of Conveyancing – Increased The Use Of Title Insurance Policies.**

Like a title opinion from a conveyancing attorney, “[a] title insurance policy provides protection against defects in, or liens or encumbrances on, title.” Somerset Sav. Bank v. Chicago Tit. Ins. Co., 420 Mass. 422, 428 (1995). A title insurance policy typically provides that the title insurance company will indemnify the insured (the owner and/or the lender) for any loss caused by a title defect that existed on the date of the policy, unless the defect was excluded from coverage. E.g., Private Lending & Purchasing, Inc., 54 Mass. App. Ct. at 537 (a title insurance policy is in “the nature of a covenant of warranty against encumbrances”); Omega Healthcare Investors, Inc. v. First American Title Ins. Co., 2003 WL 79037 \*2 (D. Mass. Jan. 9, 2003) (title policy covers any loss resulting from a defective title). Cf. 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”).

The increased use of title insurance in the last twenty years stems – not from any change to the nature of conveyancing – but from the emerging importance of the secondary mortgage market in which millions of dollars worth of individual mortgages were packaged and sold across the country. For the mortgages to be freely traded as commodities, that market had to be assured “that the title to the real estate being mortgaged was acceptable within its guidelines and that its mortgages were valid and enforceable without its having to become familiar with the vagaries of real estate law and conveyancing practice from jurisdiction to jurisdiction.” Ward P. Graham, *et al.*, Residential and Commercial Title Insurance: What It Is, What It Does and How It Works 2 (MCLE 2004). Therefore, the secondary mortgage market required a form of title assurance that, unlike attorney opinions, was standardized, provided a non-fault based remedy for loss caused by title defects, and could be transferred with the mortgages.

**B. The Issuance Of A Title Policy Is Based On A Title Examination And A Resulting Opinion Of Title, And Where That Is Performed By A Third Party For The Title Insurer It May Be Done Only By An Attorney.**

Because the risk of loss (i.e., a title defect) is a knowable condition that exists at the time the title policy issues, it is possible to eliminate potential claims by identifying defects in the title and correcting them before issuing a title policy. Consequently, title insurance is based, not on actuarial tables, but on a thorough title examination to ascertain what, if any, defects, liens or encumbrances exist as of the date that the policy will issue. See Lawyers Title Ins. Corp. v. Research Loan & Inv. Corp., 361 F.2d 764 (8<sup>th</sup> Cir. 1966) (“the essence of the title insurance transaction is to obtain a professional title search, opinion, and guarantee”). 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 under the policy. 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 losses claimed under the policies. 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”).

The title insurers do not themselves examine the title to the real property being insured. Instead, the title examination that has been conducted by the conveyancing attorney (see supra at pages 9 - 13) provides the basis for the policy. 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). The determination as to the specific exceptions to coverage and the decision to issue or not to issue a title insurance policy are ordinarily made by the title agent (i.e., the conveyancing attorney) based on his title examination and not by the title insurance company directly. Although the title insurer has underwriting guidelines, the title insurer does not control the manner in which the title agent/conveyancing attorney determines the “quality of title.” When the title agent/conveyancing attorney determines that the “quality of title” is acceptable, i.e., insurable, and that a legally valid interest in the real property has been conveyed in accordance with the parties’ contractual obligations, he issues a policy.

As discussed below, a review of title to residential property constitutes the practice of law. E.g., Opinion of the Justices, 289 Mass. at 615 (act of searching the public records of real estate transactions accompanied by an “opinion or advice as to the legal effect of what is found” constitutes the practice of law); In re Behenna, 92-72BD (Jan. 19. 1993) (O’Connor, J.) (“title examination, even without the rendering of advice, would constitute the practice of law”); In re Oates, No. 81-11BD (Aug. 6, 1986) (Liacos, J.) (“[T]itle searching its commonly perceived by the general public to be a pursuit, if not exclusively within the realm of the legal profession, closely associated with it”).

Courts have also specifically held that the activities of a title agent, which largely consist of reviewing the legal title to the real 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 interpretations 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); McLaughlin v. Attorneys’ Title Guaranty Fund, 61 Ill. App. 3d 911, 915-16, 378 N.E.2d 355, 359, 18 Ill. Dec. 891 (1978) (“When a person seeks title insurance, he expects to obtain a professional title search legal opinion as to the condition of title”). Consequently, other than the title insurer itself,<sup>4</sup> only an attorney may issue a title insurance policy that insures the title to real estate in Massachusetts.<sup>5</sup>

**C. Unlike Other Forms Of Insurance Which Insure Against The Future Happening Of A Covered Event, Title Insurance Insures Against The Economic Consequences Of An Event That Has Already Occurred.**

Finally, the idea that because non-attorneys sell other forms of insurance – like life insurance and automobile insurance – anyone can issue a title insurance policy, is wrong. As noted above, title insurance is unlike every other form of insurance in that it does not insure against prospective risks. In every other type of insurance, the insurance company analyzes and attempts to measure the risk of some

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<sup>4</sup> Of course, the title insurer can make such legal decisions regarding title for itself. See G.L. c. 175, § 47(11) which authorizes a title insurer to “examine titles of real and personal property.”

<sup>5</sup> Based on its actions following the 1935 decision in Opinion of the Justices, the Massachusetts Legislature came to the same conclusion. In response to that decision, the Legislature repealed G.L. c. 221, § 47, which had excepted title insurers from the unauthorized practice of law statute. The act of repeal demonstrates a recognition by the Legislature that the examination of titles for insurance purposes constitutes the practice of law. St. 1935, c. 346, § 3.

loss that may occur in the future – how likely you are to die, to have your house burn down, to have an automobile accident, or to suffer from a medical condition – and determines the premium to be charged to insure that future risk. Title insurance operates on a completely different principle.

[A] title insurance policy looks backwards where other forms of insurance look forward in terms of the happening of the event or contingency that gives rise to the loss for which the insurance coverage is provided. Under the terms of the policy, title insurance insures against loss or damage incurred by the insured after the date of the policy but the loss of damage must result from covered matters which had occurred on or before the date of the policy. Contrast this with other forms of insurance (liability, casualty, medical, automobile, life, malpractice, etc.) where both the event or matter insured against and the loss or damage . . . occur after the policy date. Thus, other forms of insurance insure against the future happening of a covered event, whereas title insurance insures against the economic consequences of an event that has already occurred.

Ward P. Graham, *et al.*, Residential and Commercial Title Insurance: What It Is, What It Does and How It Works 4-5 (MCLE 2004). See also Nat'l Mortgage Corp. v. Ame Title Ins. Co., 299 N.C. 369, 374-75, 261 S.E.2d 844, 847-48 (1980) (“Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it”). Arthur L. Eno, Jr., *et al.*, 28 Mass. Practice: Real Estate Law § 30.7 at 793 (West Group 2004) (“Title insurance addresses the quality of real property ownership rather than protecting against a possible happening to the property as a fire or other risk type insurance would”).

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

Among its other services, NREIS sells title insurance policies to lenders and property owners. NREIS's agency agreements with various title insurance companies all, in one way or the other, provide that NREIS's issuance of a title insurance policy is to be based on a full and complete examination of the records of title to the real estate. NREIS acknowledges that it is not competent to undertake the title examination required to issue a title insurance policy and does not conduct any review of the status of

title with respect to issuance of title insurance policies. Rather, those policies are prepared based entirely on an abstract provided by a non-attorney (who NREIS mistakenly thought was an attorney). All that NREIS does is act as a scrivener by copying information from the document prepared by the non-attorney and enter it into a database. 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.

**IV. THERE ARE SIGNIFICANT PUBLIC POLICY JUSTIFICATIONS FOR RESTRICTING CONVEYANCING TO THOSE PERSONS TRAINED IN THE LAW AND SUBJECT TO THE SUPERVISION AND OVERSIGHT OF THE COURT.**

The Supreme Judicial Court has observed that the “right to practice law is not one of the inherent rights of every citizen, as is the right to carry on an ordinary trade or business.” In re Keenan, 314 Mass. 544, 546-47 (1943). Instead, the “peculiar privilege” of advising others as to their legal rights and acting to secure those rights is a “quasi public occupation” granted to few. Id. Furthermore, the Supreme Judicial Court has determined that such restrictions “can be justified only on the ground that long experience has shown it to be absolutely essential to the public welfare.” Id. See also In re Daley, 549 F.2d 469, 477 (7<sup>th</sup> Cir. 1977) (“the quality of the practice of law so vitally affects the public welfare”); Nelson v. Smith, 107 Utah 382, 387, 154 P.2d 634, 637 (1944) (“practice of law is so affected with the public interest that the state has both a right and a duty to control and regulate it in order to promote the public welfare”). By permitting only attorneys to convey residential real property, the Supreme Judicial Court protects and promotes the interests of the clients, not the attorney, as well as protecting the other parties to the real estate transaction, and the public generally.

**A. Massachusetts Has A Strong Public Policy To Ensure That Advice Regarding Legal Matters Is Provided Only By Qualified Persons Subject To The Control And Oversight Of The Courts.**

The power of the Massachusetts judiciary to control those who are advising other individuals as to the obligations and rights created by the Commonwealth's laws is an essential and necessary part of its function. However, the fundamental public policy justification for permitting only licensed attorneys to conduct conveyances for their clients, and excluding all others, "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." Lowell Bar Ass'n, 315 Mass. at 180. See also In re Shoe Mfrs. Protective Ass'n, 295 Mass. at 372 (advice as to legal rights "cannot be carried on with fairness to the persons whose rights are involved or with safety to the public except by those who have specially fitted themselves for the task by long study and preparation, who are subject to professional discipline, and who act under the constant sense of professional responsibility"); LAS Collection Management v. Pagan, 447 Mass. 847, 850 (2006) ("The purpose of the limitation is to protect the public"); 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"). This public policy has also been further expressed by the Supreme Judicial Court in the Rules of Professional Conduct and by the Legislature in the statutes prohibiting the unauthorized practice of law. See G.L. c. 221, § 46A ("No individual, other than a member, in good standing, of the bar of this commonwealth shall practice law"); Rule 5.5 of the Massachusetts Rules of Professional Conduct, comment (2) ("Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons").

**B. Because The Mortgagor Necessarily Relies On The Lender's Agent To Properly Convey The Rights In The Property, There Is A Strong Public Policy That Conveyancing Be Conducted By Attorneys.**

As discussed above, the primary policy justification for restricting the practice of law to attorneys is to ensure that clients are represented in legal matters by persons that have demonstrated their

competence and qualifications. In the context of the typical residential real estate transaction, the lender (who is a client of the conveyancing attorney) clearly has an interest in ensuring that the attorney is qualified to convey the property. However, the mortgagor has an equally strong interest in the attorney's proficiency and skill. Like the lender, the mortgagor has entrusted the conveyance to the conveyancing attorney and necessarily relies on him to complete it in accordance with the law. In fact, the mortgagor is generally not given a choice to conduct the conveyance himself. Therefore, the same public policy that exists to ensure that the lender is adequately represented in legal matters extends to the mortgagor.

The fact that the direct attorney-client relationship is between the lender and the conveyancing attorney does not preclude a duty owed by the conveyancing attorney to the mortgagor. Under Massachusetts law, "an attorney owes a duty to non-clients who the attorney knows will rely on the services that he renders to his client." Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 524, cert. denied, 493 U.S. 894 (1989). See also Lamare v. Basbanes, 418 Mass. 274, 276 (1994) ("the court will recognize a duty of reasonable care if an attorney knows or has reason to know a nonclient is relying on the services rendered"); DeRoza v. Arter, 416 Mass. 377, 382 (1993) ("Such a duty may arise, however, only if the attorney reasonable should have foreseen reliance on the part of the third party"); Williams v. Ely, 423 Mass. 467, 475 (1996) ("An attorney may owe a duty to nonclients who the attorney knows will rely on the services rendered"). An independent duty to non-clients is owed to the third party where, as here, the service provided is intended to benefit the client as well as the non-clients. Kirkland Construction Co. v. James, 39 Mass. App. Ct. 559, 562 (1995).

A duty to a non-client is less likely to be found to exist when such a duty may conflict with the duty owed to the existing client. Obviously, the lender and the mortgagor have differing interests with respect to the terms of the loan, prepayment rights, disclosure law, late charge provisions and special mortgage provisions. See Page v. Frazier, 388 Mass. 55, 63 (1983). However, there is no such conflict with respect to the conveyance of the property interest. The interests of the parties in the conveyance

coincide with one another. Both the lender and the mortgagor seek to ensure that the title to the property is without defects and that their respective interests are validly transferred.

In fact, Massachusetts law expressly recognizes that the interests of the lender and the mortgagor are aligned. Section 70 of Chapter 93 of the General Laws, discussed below, requires the conveyancing attorney to provide the mortgagor with the same certification of title to the real property being conveyed that the attorney provides to its client. In relevant part, the statute provides that “such certification shall be deemed to have been rendered for the benefit of the mortgagor to the same extent as it is for the mortgagee.” G.L. c. 93, § 70. Similarly, the conveyancing attorneys typically offer to provide to both the lender and the mortgagor title policies that insure their respective interests in the real property.

**C. In Order To Maintain The Integrity And Reliability Of The Commonwealth’s Recording System Public Policy Requires That Only Attorneys Be Permitted To Convey Real Property For Others .**

In addition to protecting the interests of the parties to the real estate transaction, restricting conveyancing to attorneys protects the public’s interest in the integrity and reliability of its registries of title. More than 350 years ago, Massachusetts recognized that “[b]ecause of the long-recognized inevitability and ubiquity of controversies over land,” a system of recording property conveyances was necessary so that “[e]very man may know what estate or interest other men may have in houses, lands or other hereditaments they are to deal.” Long v. Wickett, 50 Mass. App. Ct. 380, 397 n.13 (2000), citing Alfred L. Eno, Jr., *et al.*, 28 Mass. Practice: Real Estate Law § 2.1, at 13 n.1 (3<sup>d</sup> ed. 1995). The Commonwealth’s public recording system that has existed since that time serves two main purposes.

First and foremost, [recording acts] are designed to protect purchasers who acquire interests in real property for a valuable consideration and without notice of prior interests from the enforcement of those claims. ... The second purpose of recording acts is fundamental to the achievement of the first. To make the system self-operative and to notify purchasers of existing claims, the recording acts create a public record from which prospective purchasers of interests in real property may ascertain the existence of prior claims that might affect their interests.

Selectmen of Hanson v. Lindsay, 444 Mass. 502, 507 (2005), quoting 14 R. Powell, Real Property § 82.01[3], at 82-13, 82-14 (M. Wolf ed. 2000). See also Ward v. Ward, 70 Mass. App. Ct. 366, 370 n.7 (2007) (“The purpose of the recording statute ... is to show the condition of the title to a parcel of land and to protect purchasers from conveyances that are not recorded and of which they have no notice”); Lamson & Co. v. Abrams, 305 Mass. 238, 244 (1940) (“One is entitled to rely upon the record.... He may deal with the title to the land as he finds it upon the record”). Howard J. Alperin and Lawrence D. Shubow, 14C Mass. Practice: Summary of Basic Law § 17.112 (3d ed.) (recording statute has two purposes: “(1) it protects bona fide purchasers who acquire an interest in real property without notice of a prior unrecorded deed to the same property; and (2) it provides for a public record showing the condition of the title to a particular parcel of land”).

The reliability and soundness of the public records of conveyances are of great public significance since accurate records impede fraud, foster the alienability of real property, and provide for predictability and integrity in real estate transactions. “Property owners, prospective purchasers, potential lenders, title searchers and title insurers alike must each be able to rely confidently on the integrity of the land records.” Lichtman v. Beni, 280 Conn. 25, 35, 905 A.2d 647, 653 (2006). Peckheiser v. Tarone, 186 Conn. 53, 57, 438 A.2d 1192 (1982) (“It has always been the policy of our law that the land records should be the authentic oracle of title on which a bona fide purchaser ... might safely rely”). The justification for permitting only licensed attorneys to conduct conveyances on behalf of others is found, not only in the protection of the parties to the transaction, but in the maintenance of the reliability and integrity of this recording system established by the Commonwealth. See Pennsylvania Baptist Convention v. Regular Baptist Church of Smethport, 377 Pa. 631, 634, 105 A.2d 296, 298 (1954) (“Nothing can be more indispensable to a well ordered society and a smoothly functioning civilization than the integrity of its records involving property”); In re Kirchner, 372 B.R. 459, 465 (Bkrcty. W.D. Wis. 2007) (“The integrity of the state’s deed recording system is nearly sacrosanct under the law of real property”).

In order for the recording system to continue to serve its public function, the integrity and reliability of the system must be maintained. That can only be accomplished by title examinations by attorneys who are qualified to identify defects and encumbrances and take necessary curative actions to eliminate those defects and encumbrances. When conveyancing is entrusted to non-attorneys, like NREIS, there is no meaningful title examination, no identification of defects or encumbrances, and no curative action. While the real estate transactions could conceivably proceed without such actions, provided that NREIS issued title insurance policies to indemnify the parties, there would be a gradual deterioration in the certainty of titles. The integrity and reliability of the recording system would be eroded and its usefulness undermined. It is the curative action taken by conveyancing attorneys, or at their direction, that maintains the high degree of certainty of title in the Commonwealth's registries. Golden v. General Builders Supply LLC, 441 Mass. 652, 661 (2004) (the "integrity and reliability of the of recording system" is of great public concern).

**V. A NUMBER OF STATUTES ENACTED BY THE LEGISLATURE REFLECT THE PUBLIC POLICY THAT CONVEYANCING IS TO BE CONDUCTED BY ATTORNEYS.**

Oversight and control of the practice of law is under the exclusive authority of the Supreme Judicial Court. Opinion of the Justices, 289 Mass. at 612. However, under its police power and to protect the public interest, the Massachusetts Legislature may enact laws that are in the aid of the judiciary, and not to the exclusion of the constitutional powers of the judiciary. Three statutes have been enacted that bear upon the process of conveying property in the Commonwealth. Significantly, each of these statutes, discussed below, has provisions that either anticipate or require the involvement of an attorney in the practice of conveyancing.

**A. Title Certification Statute, G.L. c. 93, § 70, Provides That The “Attorney” For The Mortgage Lender Must Provide A Certification Of Title To The Borrower .**

In 1972, the Massachusetts Legislature enacted the Title Certification Statute, G.L. c. 93, § 70, which provides that the attorney for the mortgage lender is required to provide the mortgagor with a certification of title to the real property being conveyed. The statute specifically states that the certification must come from the “attorney” for the mortgage lender. 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. The certification is to include a statement that at the time the mortgage is recorded the homebuyer holds good and sufficient record title to the property free from all encumbrances, and is effective for the benefit of the homebuyer as long as he owns the property. A similar certification is required to be provided by the attorney to the lender and is effective as long as the mortgage is outstanding. Although it is obvious from the express language of the statute, the Massachusetts Division of Banks, which has regulatory authority over mortgage lenders and brokers, has recognized that the title certification required by the Title Certification Statute may be rendered “only by a practicing attorney.” See Massachusetts Division of Banks Opinion 98-135. Moreover, under the provisions of the Title Certification Statute, any “willful failure” by the attorney to render a certification to the homebuyer shall constitute an unfair or deceptive act or practice under the provisions of G.L. c. 93A.

**B. The Good Funds Statute, G.L. c. 183, § 63B, Provides That The Loan Proceeds May Not Be Held By A Non-Party Like NREIS But Must Be Transferred To The “Mortgagor, Mortgagor’s Attorney Or Mortgagee’s Attorney.”**

In 1994, the Massachusetts Legislature enacted the Good Funds Statute, G.L. c. 183, § 63B, to ensure that the mortgage loan proceeds are completely funded before the mortgagor’s property is encumbered. In Roberts v. Crowley, 538 F. Supp. 2d 413, 418 (D. Mass. 2008), Judge Saylor noted:

The [Good Funds Statute] here “appears to have been enacted in response to the intolerable problems that arose when it was learned that a now-defunct lender, Abbey Financial Inc., which filed for bankruptcy protection, had failed to fund several mortgage

loans.” [citations omitted] The statute appears intended to ensure that borrowers are not placed in the unfortunate situation of having a mortgage recorded against their property without receiving the benefit of the proceeds of the loan.

The statute requires that the full amount of the mortgage loan proceeds due to the mortgagor pursuant to the Settlement Statement 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. NREIS’s practice of holding the mortgage proceeds, in order to benefit from the interest paid on such amounts, and disbursing such proceeds from its account, appears to be a clear violation of the Good Funds Statute.

**C. The Mortgage Discharge Statute, G.L. c. 183, § 54C, Provides That The “Attorney” Who Conducted The Closing And Paid Off The Mortgage Can Effect A Discharge By Filing An Affidavit Recounting The Payment.**

The Mortgage Discharge Statute, G.L. c. 183, § 54C, was enacted in response to the failure of many mortgage lenders to promptly issue discharges of mortgages that had been fully paid. The Mortgage Discharge Statute provides that the “attorney” who sent the mortgage lender the funds to pay the outstanding mortgage can execute an affidavit recounting the payment of the funds and the efforts to obtain a discharge. When the attorney’s affidavit is filed with a copy of the cancelled check showing payment, the mortgage is discharged. G.L. c. 183, § 54C. Because the Mortgage Discharge Statute refers to the “attorney’s” role in the conveyancing process, it clearly anticipates that attorneys, rather than laypersons, would have handled the settlement and forwarded the mortgage payoff checks to the mortgagees.

**CONCLUSION**

In light of the Supreme Judicial Court's 1935 decision, and the recent Superior Court decisions, it cannot be disputed that conveyancing constitutes the practice of law. For the reasons stated above, the Plaintiff is entitled to a declaratory judgment that (1) a conveyance of residential real estate may only be conducted by an attorney who must control or supervise all the aspects of this process; and (2) when a conveyance of residential real estate is performed, not by a licensed attorney, but by a non-attorney settlement service provider, and retains an attorney solely to witness the execution of documents at the settlement of that transaction, the settlement service provider is engaged in the unauthorized practice of law.

THE REAL ESTATE BAR ASSOCIATION  
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By its Attorneys,

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Dated: December 12, 2008