Marketable vs. Insurable Title and Attorney Certification Statute, MGL c. 93, §70

~ Practical Skills Session ~

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Lisa Delaney, the owner of the Braintree firm Carvin & Delaney, LLC, concentrates her practice on large commercial transactions, where she handles complex title research, providing detailed analysis of clear and concise facts. She negotiates and drafts commercial contracts with a focus on leasing and purchase agreements. In addition to her own clients, Lisa's practice includes title counsel for other lawyers and provides title and closing services, litigation consultation, and appearances as Land Court Examiner or expert witness in title litigation matters. She also offers a full-service residential practice to homeowners, buyers and sellers.

A member of the REBA Board of Directors, Lisa led a working group of the Association's Standards and Forms Committee in the development and drafting of proposed REBA Form No. 66, a comprehensive 20-page rider of provisions for residential purchase and sale agreements. She is also a principal drafter of the Massachusetts Homestead Statute and several of REBA's title standards and forms.

Lisa is a frequent seminar panelist for REBA and has spoken on homestead, agricultural/horticultural law, mortgage discharge curative statutes and obscure title issues. In addition to REBA, Lisa is an annual seminar panelist for MCLE on the process and ethics throughout a residential transaction.

Lisa received her J.D. from Suffolk University Law School.

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Ward Graham has been an underwriting and claims counsel in the title insurance industry for over 35 years, most recently joining Old Republic Title as Vice President and Senior Underwriting Counsel in 2016. After a tour of duty as a U.S. Naval Judge Advocate, Ward spent several years in private practice concentrating in the areas of real estate conveyancing and probate before entering the title insurance industry. Throughout his career in the title insurance industry, Ward's focus has always been on legal education and creative solutions to title problems in order to facilitate real estate transactions.

Ward is a member of the REBA Standards & Forms Committee and Legislation Section. He is also a member of the Abstract Club, a past president of NELTA, and a contributing author to the MCLE publication, *Real Estate Title Practice in Massachusetts* (2nd ed. 2010) (specifically, Chapter 4 on Title Insurance, §4.2(c), reference to which was made by the SJC in footnote 42 of *REBA v. NREIS*, 459 Mass. 512, 534-535 (2011), for reference with respect to "Massachusetts case law relating to different types of marketable title promised in purchase and sale agreements"). He has participated in numerous seminars on topics of real estate law and title insurance and was a guest lecturer for several years for the Real Estate Litigation Course at Suffolk University Law School.

Ward received his J.D. from Suffolk University Law School and his B.A. from Tufts University.

Marketable vs. Insurable Title and Attorney Certification Statute, MGL c. 93, §70

SECTION 1: CERTIFICATION STATUTE AND SAMPLE CERTIFICATION FORM

M.G.L. c. 93, §70. Certification of title to mortgaged premises; liability of attorney; unfair practice

In connection with the granting of any loan or credit to be secured by a purchase money first mortgage on real estate improved with a dwelling designed to be occupied by not more than four families and occupied or to be occupied in whole or in part by the mortgagor, an attorney acting for or on behalf of the mortgagee shall render a certification of title to the mortgaged premises to the mortgagor and to the mortgagee.

For the purposes of this section, said certification shall include a title examination which covers 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; provided, however, that in the case of registered land, it shall be sufficient to start the said examination with the present owner's certificate of title issued by the land court, except that bankruptcy indices and federal and state liens shall be examined. The term record title, as used herein, shall mean the records of the registry of deeds or registry district in which the mortgaged premises lie and relevant records of registries of probate.

The certification shall include a statement that at the time of recording the said mortgage, the mortgagor holds good and sufficient record title to the mortgaged premises free from all encumbrances, and shall enumerate exceptions thereto. The certification shall further include a statement that the mortgagee holds a good and sufficient record first mortgage to the property, subject only to the matters excepted by said certification.

The liability of any attorney rendering such certification shall be limited to the amount of the consideration shown on the deed with respect to the mortgagor, and shall be limited to the original principal amount secured by the mortgage with respect to the mortgagee. Said certification shall be effective for the benefit of the mortgagor so long as said mortgagor has title to the mortgaged premises, and shall be effective for the benefit of the mortgagee so long as the original debt secured by the mortgage remains unpaid.

Willful failure by an attorney to render a certification to the mortgagor as required by the provisions of this section shall constitute an unfair or deceptive act or practice under the provisions of chapter ninety-three A.

SAMPLE ATTORNEY'S CERTIFICATE OF TITLE

SELLER:
BUYER/BORROWER:
LENDER:
PREMISES:
DATE:
SETTLEMENT ATTORNEY:

Pursuant to Massachusetts General Laws Chapter 93, Section 70, we hereby certify to Buyer and Lender that upon the recording of the mortgage described below, Lender is the holder of and mortgagee named in a good sufficient record first mortgage to the premises subject to the matters excepted by this certification, given to it by Buyer, mortgagors, dated _____ covering the premises located at _____ and securing the payment of a note in the sum of $_____, based on a contract sales price of $_____, and to certify also to said mortgagors that upon the recording the same mortgage, the mortgagors hold good and sufficient record title to the mortgaged premises free from all encumbrances except said mortgage and further subject to the following matters which are specifically excluded from this certification of title:

1. those encumbrances referred to in General Laws, Chapter 185, Section 46, (which encumbrances include liens not required to appear of record, taxes within two years after being committed to the collector, public and private ways laid out on registered land under Section 21 of Chapter 92 without boundary determination statements, leases under seven years, liens for betterment, assessments, and Federal liens for unpaid taxes) if notice of such encumbrance is not recorded with the Registry;

2. any real estate taxes not presently due and payable;

3. any encroachments, boundary line disputes or other state of physical facts which may be revealed by a personal inspection or accurate survey of the Property;

4. rights or claims of parties in possession not shown by the Records;

5. easements, or claims of easements, not shown by the Records;

6. any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the Records;

7. any law, ordinance, bylaw, or other governmental regulation affecting, restricting, prohibiting, or otherwise regulating the occupancy, use or enjoyment of the Property, the character, dimensions, or location of any present or future improvement now existing or hereafter planned for the Property, or a separation in ownership or change in the dimensions or area of the Property (including, without limiting the generality of the foregoing, Zoning Laws, State Building Code, Wetlands Protection Act, Subdivision Control Law, Lead Paint Law, health laws, sewage disposal laws, historic districts, and pollution control laws);

8. matters not of record known, suffered or created by the Mortgagor and/or the Mortgagee;

9. any lien or claim, any other tax liability, or any matter of bankruptcy or insolvency that may not appear in the indices of Registry of Deeds in which the said premises are located;

10. forgeries;

11. errors and omissions in the records and indices of the Registry of Deeds and relevant Registries of Probate;

12. lack of sufficient capacity or competency of grantors;

13. such matters, if any, shown on the Exhibit "A" attached hereto and made a part hereof;

14. the mortgages which were paid as part of the transaction and listed on the closing settlement statement.

Our examination of title covers a period of at least fifty years and was confined to the records of the Registry District or the Registry of Deeds in which the mortgaged premises lie and to relevant records of Registries of Probate. If the premises herein is registered land, then a portion of the 50-year title exam may consist of our reliance on the integrity of a Certificate of Title dated within the past 50 years as the earliest instrument in our title.

Our liability to the Mortgagor shall be limited to the amount of consideration shown on the deed to the Mortgagee filed immediately prior to the filing of the Mortgage. Our liability to the Mortgagee shall be limited to the original principal amount secured by the Mortgage. Further, our liability shall otherwise be limited as provided in Massachusetts General Laws, Chapter 93, Section 70, as amended by Chapter 448 of the Acts of 1980, which Section sets forth the requirements for title certifications.

Settlement Attorney

By _____

Receipt of copy of Certification of Title
Acknowledged on _____

Buyer _____

SECTION 2: REBA TITLE AND PRACTICE STANDARDS AND SELECTIONS FROM REBA FORMS NO. 21 (PURCHASE AND SALE AGREEMENT FOR MASSACHUSETTS REAL ESTATE) and FORM NO. 66 (SAMPLE RIDER PROVISIONS TO RESIDENTIAL PURCHASE AND SALE AGREEMENT) (comments and caveats removed)

GENERAL MARKETABILITY, TITLE INSURANCE AND TITLE STANDARDS

REBA Form No. 21 – selected paragraphs relating to quality of title and options for title issues:

2.4. The Premises shall be conveyed on the Date and Time of Closing at the Place of Closing by a good and sufficient deed (accompanied by a Certificate of Title if this is registered) running to Buyer (or Buyer's Nominee) conveying a good and clear record and marketable title thereto free from all encumbrances except those listed in Paragraph 1.11 and the following:

a. Real Estate Taxes assessed or to be assessed on the Premises to the extent that such taxes then are not yet due and payable.

b. Betterment assessments, if any, which are not a recorded lien on the Premises as of the Date of this Agreement.

c. Federal, state and local laws, ordinances, by-laws and rules regulating the use of land, particularly environmental, building, zoning, health, rent control and condominium conversion laws, if any, applicable as of the Date of this Agreement, provided that at the Date and Time of closing the Premises may be used as of right for single family residential use;

d. Existing rights, if any, in party or partition walls; and

e. Utility easements in the adjoining ways

2.11. Seller may, if Seller so desires, at the Closing, use all or part of the Purchase Price to clear the title of any encumbrances or interests provided at all instruments necessary for this purpose are recorded by and at the expense of Seller simultaneously with the deed or at such later time as shall be reasonably acceptable to Buyer, and provided further, with respect to discharges of mortgages from insurance companies, banks and credit unions, such discharges may be recorded within a reasonable time after the recording of the deed.

2.12. If Seller is unable to convey title or deliver possession of the Premises as required hereunder or the Premises do not comply with the requirements of Paragraph 2.10, upon notice by either party, prior to the Date of Closing, this Agreement shall be automatically extended for 30 days (or if Buyer’s mortgage commitment sooner expires, to a date one business day before the expiration of such commitment). Seller shall remove all mortgages, attachments and other encumbrances incurred or assumed by Seller which secure the payment of money, provided the total amount thereof does not exceed the Purchase Price, and Seller shall use reasonable efforts to remove other defects in title, or to deliver possession as provided herein, or to make the Premises conform to the provisions hereof.

At the end of the extended period, if all such defects have not been removed, or the Seller is unable to deliver possession, or the Premises do not conform with the requirements of this Agreement, Buyer may elect to terminate this Agreement and to receive back all deposits, upon receipt of which all obligations of the parties hereto shall cease.

At the original or extended time for performance, Buyer may elect to proceed with the Closing upon payment of the full Purchase Price reduced by an amount sufficient to remove all mortgages, attachments and other encumbrances which secure the payment of money which have not been removed by Seller but otherwise without deduction. In the event that the reason the Premises do not conform is damage to the Premises caused by fire or other casualty insured against, and Seller has not restored the Premises to their former condition and Buyer elects to proceed, Seller shall assign all insurance proceeds to Buyer and the Purchase Price shall be reduced by:

a. the net amount of any insurance proceeds which a mortgagee has applied to the mortgage debt,

b. less any amounts reasonably expended by Seller for partial renovation.

c. the amount of any insurance proceeds received by Seller; and

d. any deductible amount under Seller's insurance policy.

2.21 Any matter or practice arising under or relating to this Agreement which is the subject of a Title Standard or a Practice Standard of the Real Estate Bar Association for Massachusetts shall be governed by said Standard to the extent applicable.

REBA Form No. 66, Par. 5.12. REBA forms, title standards and practice standards

Any title or practice matter which is the subject of a Title or Practice Standard or a Form of the Real Estate Bar Association for Massachusetts (REBA) shall be governed by said Title or Practice Standard or Form to the extent applicable, unless the Title or Practice Standard or the Form has been mooted by case law or statute in effect prior to the effective date of the Purchase and Sale Agreement.

REBA Form No. 66, Par. 5.14. Title insurance provision

In addition to the condition that title to the property is marketable, BUYER's performance hereunder is conditioned upon title to the premises being insurable on an ALTA form owner's insurance policy issued by a recognized title insurance company licensed to do business in the Commonwealth of Massachusetts, at normal premium rates. In the event of a title matter for which a title insurance company is willing to issue so-called "affirmative coverage" over a known defect or problem, BUYER may elect to accept same but shall not be required to do so, and shall have the right, at their option, to deem title to the premises unacceptable or unmarketable and terminate the Purchase and Sale Agreement.

REBA Form No. 66, Par. 5.2 title and land use conformity and compliance

It is understood and agreed by SELLER and BUYER that the subject premises shall not be in conformity with the Purchase and Sale Agreement unless:

(a) all buildings, structures and improvements, and all means of access to the [ ] premises or [ ] Condominium of which the Unit is a part are located completely within the boundary lines of said [ ] premises or [ ] Condominium, and do not encroach on, over or under easements of which the subject [ ] premises is or [ ] Condominium is the servient estate;

(b) no building, structure or improvement of any kind belonging to a person other than [ ] SELLER or [ ] Condominium of which the Unit is a part encroaches on or under said premises;

(c) the [ ] premises or [ ] Condominium abut or have valid private access to a public way or a way laid out and approved by a municipal planning board pursuant to the Subdivision Control Law or ordinance, zoning bylaw, etc. for those cities and towns that have not adopted the Subdivision Control Law;

(d) the premises are not in violation of applicable zoning codes and ordinances, including the use of the premises for residential purposes;

(e) the premises are equipped with all necessary utilities, including without limitation electricity, municipal or private water supply, septic or sewer, as applicable, and all utilities and appurtenant easements serving the premises are unencumbered and have title that is both record and marketable;

(f) the premises are in compliance with all recorded land use documents. All required land use completion documents are recorded at or prior to the Closing and contain either no continuing conditions or only those conditions requiring reasonable property maintenance.

(g) the premises are not in a special flood hazard area for which an institutional lender would require BUYER to purchase flood insurance.

MORTGAGE PAYOFFS AND DISCHARGES

REBA Practice Standard No. 17. Mortgage Discharges.

It is the duty of the seller (through seller's attorney if seller has one) to provide promptly to the buyer's attorney and the attorney for buyer's mortgagee, upon request, the name, address (including branch) and customer service telephone number of seller's mortgagee and the account number of the mortgage, as well as the seller(s) social security number. Such information shall be provided in writing and shall include authorization to obtain payoff information for the mortgage. If this information is not provided promptly and the attorney for the buyer or mortgagee is required to obtain this information, the attorney may make a reasonable charge to the seller for such services, as well as for obtaining a mortgage payoff letter.

To facilitate the closing adjustments, attorneys are encouraged to suggest to their clients selling property that they refrain from making mortgage payments within seven days of the closing, provided such conduct will not result in a default under the mortgage or in an additional charge. The attorney shall be entitled to rely upon the last available written payoff statement from the lender.

It shall be the duty of a mortgagee to provide promptly written information relating to its mortgage loans, including the outstanding balance, accrued interest, late charges, escrow deposits and per diem rates, to an attorney representing himself or herself as a buyer's, seller's or mortgagee's counsel.

It shall be reasonable for an attorney representing a buyer's mortgagee to charge the seller (in the case of a sale) a reasonable fee for pursuing the current mortgagee of record for a discharge and attending to other matters to clear the record title. It is also reasonable for an attorney representing a buyer's (in case of a sale) or borrower's (in case of a refinance) mortgagee to charge a reasonable fee for obtaining discharges of prior outstanding mortgages of record and attending to other matters to clear the record title. If the discharge to be obtained is of a mortgage granted by the seller or borrower, then a moderate fixed charge is reasonable. The attorney making the charge or arranging for the payoff shall obtain and record a proper discharge, or verify that a proper discharge has been recorded.

REBA Form 66, Par. 1.6. Recording of mortgage discharges.

Mortgage discharge documents by banks or other institutional lenders may be delivered after the recording of the deed and delivery of closing proceeds to SELLER providing same are paid for in full as a closing disbursement pursuant to lender’s or lender’s servicer’s mortgage pay-off letter complying with the provisions of M.G.L. Ch. 183, s. 54. All other release documents and all releases for liens held by personal or non-institutional lenders must be delivered to BUYER at the time of the delivery of SELLER’s deed.

REBA Practice Standard No. 29. Discharge or Partial Release of Private Mortgages.

At the closing of a transaction involving real property encumbered by a private mortgage that is to be discharged or partially released as part of the transaction, the owner shall:

1. Provide to the closing attorney not more than 7 days before the scheduled closing date a payoff statement or partial release payment statement from the private mortgagee that complies with M.G.L. c. 183, s. 54D, together with contact information including, without limitation, the telephone number, email address, and disbursement instructions of the private mortgagee or the private mortgagee's attorney; and

2. Arrange for the delivery to the closing attorney prior to or at the closing of the fully executed and notarized discharge or partial release, which shall be unconditionally released for recording no later than upon disbursement by the closing attorney to the private mortgagee of good funds in the amount specified in the payoff or partial release statement.

REBA Form No. 66, Par. 1.5. Equity or revolving credit mortgage.

SELLER agrees to freeze any equity or revolving credit mortgage lines prior to the issuance of the lender's payoff statement by following such written instructions as are required by each of SELLER's credit or revolving equity lenders, and each payoff statement shall contain or include written confirmation that the equity or revolving credit line has been closed.

REBA Practice Standard No. 19. Home Equity Loan Discharges.

It is considered standard practice for an attorney representing a lender or buyer in a residential loan to require the seller to notify his or her home equity lender to terminate his or her right of withdrawal from the line of credit at least 14 days before the sale and to cause such termination to be noted on the lender's payoff letter to the attorney representing the buyer or lender. It is considered standard practice for the buyer's and lender's attorneys to decline to close the purchase or the acquisition loan if the seller fails to terminate his or her equity loan in a timely manner to assure the proper satisfaction and discharge of the equity loan.

TAXES AND MUNICIPAL ASSESSMENTS:

REBA Title Standard No. 19. Municipal Lien Certificates.

A municipal lien certificate, if recorded within 150 days after its date, operates to discharge the land described therein from liens for all taxes, assessments, or portions thereof, rates and charges, not shown by the certificate to constitute liens except taxes, assessments, or portions thereof, rates and charges

(1) with respect to which evidence of a taking or sale by a municipality has been recorded, or,

(2) concerning which a statement or order creating or continuing such lien has been so filed under any provision of law, if said lien can be discharged by the recording or registration of an instrument other than a municipal lien certificate.

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(2) concerning which a statement or order creating or continuing such lien has been so filed under any provision of law, if said lien can be discharged by the recording or registration of an instrument other than a municipal lien certificate.

LAND USE ITEMS

1. Former Railroad Land:

Somerset Savings Bank v. Chicago Title Insurance Company, 649 N.E.2d 1123 (Mass. 1995)

M.G. L. c. 40, §54A

M.G.L. c. 161C, §7

2. Orders of Conditions

Lyon v. Duffy, 77 Mass.App.Ct. 860 (2010)

REBA Form No. 66, Par. 5.2(f) (repeat from above)

the premises are in compliance with all recorded land use documents. All required land use completion documents are recorded at or prior to the Closing and contain either no continuing conditions or only those conditions requiring reasonable property maintenance.

REBA Practice Standard No. 14. Orders of Condition.

Absent any agreement to the contrary, at the sale of property which, according to the record title, may be or is in fact encumbered by an Orders of Condition, the seller shall provide:

(1) A certificate of Compliance from the appropriate authority; or

(2) A partial release of the property from the Orders of Condition; or

(3) Evidence indicating that the property is released from or is in fact not covered by the Orders of Condition, such evidence to be in recordable form and be acceptable to the buyer's and the mortgagee's counsel, if any.

ASSOCIATTION FEES

REBA Practice Standard No. 26. Land Subject to a Non-Statutory Obligation to Pay Assessments.

A conveyancing attorney certifying title to property which is subject to a declaration of restrictive covenants or other instrument which imposes a non-statutory obligation on the land owner to pay assessments in connection with the use of the common property or shared amenities should obtain written documentation that all outstanding assessments have been paid through the date of conveyance. Evidence of payment should be in written form from a person purporting to be an authorized signatory of the homeowner's association or from another entity identified of record as the one responsible for the collection of assessments.

The form of such acknowledgement of payment should be, whenever possible, in recordable form.

MISSING PROBATES

REBA Title Standard No. 14. Missing Probates.

A title dependent on a deed from heirs of a person for whom there are no Massachusetts probate proceedings is not defective if:

1. the decedent died more than 25 years ago, and

   (a) a recorded affidavit or death certificate shows the date of death and place of residence at death, and

   (b) an affidavit recorded pursuant to G.L. c. 183, §§ 5A or 5B names the decedent's heirs, states that the decedent died intestate, and declares that no probate proceedings have been filed in any jurisdiction, or

2. the decedent died more than 50 years ago and instruments recorded in the chain of title of land of the decedent identify the heirs.

WHAT IS MARKETABLE TITLE AND WHOSE RESPONSIBILITY IS IT TO MAKE THAT DETERMINATION?

For the most part, the case law discussing marketable title is based on controversies stemming from a party to a purchase and sale agreement seeking to either get out of the purchase or to specifically enforce the agreement but it certainly can come up in cases involving post-closing claims of malpractice. See, for example, *Lyon v. Duffy*, 77 Mass.App.Ct. 860 (2010)(attorney's title examiner missed an Order of Conditions and, therefore, it was not excepted from the attorney's 93/70 certification of title) and *Fall River Savings Bank v. Callahan*, 18 Mass.App.Ct. 76 (1984)(closing attorney neglected to deal with potential estate tax lien issue in title coming out of a probate estate).

In a case we are all quite familiar with, The Real Estate Bar Association for Massachusetts, Inc. v. National Real Estate Information Services, 459 Mass. 512 (2011), the Supreme Judicial Court provided the following guidance with respect to both marketable title and an attorney's role in determining whether a title is marketable.

> The lender's closing attorney has a responsibility to his or her client to ensure that the seller (in a purchase and sale transaction) or borrower-mortgagor (in a mortgage financing transaction) is in a position to convey "marketable title" to the real property at issue.[41] **At its core, marketable title means title that is "free from encumbrances beyond reasonable doubt."**[42] [Citations omitted.] Determining marketable title is a multiple step process that demands both investigation of the record at the registry of deeds and analysis of all title-related information relating to the property, with **the goal of making sure that the seller—or, more at issue here, the mortgagor—actually owns the property to be mortgaged and that there are no other legal claims on the property that might otherwise frustrate or jeopardize the conveyance**.

As we have previously indicated, the first step of this process, investigation of the record at the registry of deeds and preparation of a title report or abstract, generally does not constitute the practice of law,[43] and these activities are commonly performed by nonlawyers for real estate attorneys. The second step in this process—analyzing title abstracts and other records to render a legal opinion as to marketability of title—does constitute the practice of law in Massachusetts.[44] [Citations omitted.] See also *Fall River Sav. Bank v. Callahan,* 18 Mass.App.Ct. at 77–84, 463 N.E.2d 555 (discussing obligations of lawyer in certifying marketability of title). A determination of marketable title therefore typically must be performed by an attorney prior to the execution of the mortgage documents at the closing, and also prior to recording them.[45] **We emphasize that the closing attorney possesses an ethical and professional obligation to ensure marketability of title regardless whether the closing attorney personally performs this analysis.**[46,47]

Id., at 534-536. [Emphasis added.] As you can see, there are a number of footnotes but with regard to the subject matter of title certifications under M.G.L. c. 93, § 70 and marketable title, the following footnotes are instructive:

42. There is no precise definition of marketable title in Massachusetts, and what constitutes marketable title may differ depending on the wording of documents that are relevant to the transaction, including a purchase and sale agreement when one is involved. See, e.g., *O'Meara v. Gleason,* 246 Mass. 136, 138, 140 N.E. 426 (1923) (discussing difference between "good and clear record" title and "good marketable title"). See also W.P. Graham, Title Insurance, Real Estate Title Practice in Massachusetts § 4.2(c), at 4–40—4–44 (Mass. Continuing Legal Educ.2d ed. 2010) (examining Massachusetts case law relating to different types of marketable title promised in purchase and sale agreements).

A standard purchase and sale agreement states that the seller will deliver a deed providing "good and clear record and marketable title" to the buyer. See, e.g., 1 R.A. Dillingham, Buying and Selling a Home, Massachusetts Basic Practice Manual Exhibit 5C, at 5–23 (Mass. Continuing Legal Educ.3d ed. 2009). "Good and clear record" title is title "free from obvious defects, and substantial doubts" in the record, and one for which the record "show[s] an indefeasible unencumbered estate." *O'Meara v. Gleason,* 246 Mass. at 138, 140 N.E. 426. **Accordingly, a buyer's attorney (who stands in the same place as a lender-mortgagee's attorney in a mortgage loan transaction) owes an obligation to his or her client to determine that the seller's title meets this standard.** [Emphasis added.]

46. The scope of obligation for determining marketable title has been partially defined by the Legislature. The title certification statute, **G.L. c. 93, § 70, requires an attorney** for the lender in a purchase money first mortgage **to certify that the mortgagor and mortgagee hold "good and sufficient record title" and that such certification must include a title examination dating back at least fifty years from the date of the conveyance.** The purpose of G.L. c. 93, § 70, is to ensure that "the granting of a mortgage [has] vest[ed] title in the mortgagee to the land placed as security for the underlying debt." *Lyon v. Duffy,* 77 Mass.App.Ct. 860, 865, 934 N.E.2d 831 (2010), quoting *Maglione v. BancBoston Mtge. Corp.,* 29 Mass.App.Ct. at 90, 557 N.E.2d 756. The Legislature,

however, did not impose the statute's certification requirements on mortgage refinancing transactions, and we do not do so today as a matter of an attorney's professional responsibility. Nevertheless, as indicated in the text, closing attorneys representing lender-mortgagees have an obligation to their clients to ensure that all mortgages properly vest title in mortgagees. [Emphasis added.]

47. Analyzing the title to determine marketability also may reveal either title defects or title encumbrances that need to be resolved before the transfer of title can be completed. Resolution of some title problems, such as those that require an appearance before a court, will likely involve the practice of law, while others, such as paying outstanding taxes, mortgages, and liens, may not.

In the *Fall River Savings Bank v. Callahan* case cited above by the SJC in *REBA v. NREIS*, the court was dealing with a malpractice claim against a closing attorney who failed to obtain releases of potential federal and state estate tax liens in a title coming out of a probate estate. (The case preceded the adoption of MGL c. 65C, s. 14(b) regarding reliance on no-estate-tax-return-required affidavits.) Regarding the issue of the marketability of the title, the court observed:

The question was not whether taxes were in fact owed but whether it appeared that the title might be subject to an adverse claim which could reasonably be expected to expose the purchasers to controversy and expense to maintain their title. *Smith v. Allmon,* 17 Mass.App. 712, 716, 461 N.E.2d 1237 (1984).

Id., at 81. Regarding the standards applied to the determination of the attorney's responsibility to have properly evaluated the title and recognized the need to obtain estate tax releases, the court observed:

Of 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. There may be no definitive rules which prescribe a right or wrong way to conduct a deposition but certain rules have evolved for passing on a title. Thus, reported cases have laid down that it is the duty of conveyancers to notify purchasers that their titles may be subject to contest, even if it appears that resolution of the contest will favor the purchaser-client. [Citations omitted.] "[C]aution is an indispensible attribute in examining title." Mallen & Levit, Legal Malpractice § 606 at 765. That a potential tax lien raises the prospect of controversy is apparent from cases such as *Sawl v. Kwiatkowski,* 349 Mass. 712, 212 N.E.2d 228 (1965), and *Sachs v. Hirshom,* 16 Mass.App. 704, 704–705, 454 N.E.2d 928 (1983). In the narrow range of cases where decisions and commentaries based on decisions establish a standard of lawyers' practice, a court may employ those commentaries in deciding the case. The question has become one which is more of law than fact. See Prosser, Law of Torts 206 (4th ed. 1971).

Id., at 83.

HOW DO REBA TITLE STANDARDS RELATE TO MARKETABLE TITLE?

The PREAMBLE to the REBA Title Standards provides an excellent explanation as to the relationship of the title standards to marketable title:

> The objective of the conveyancer is to determine whether or not the title in question is satisfactory of record. Objections to the title should be made only when the defect or defects could reasonably be expected to expose the prospective owner, tenant or lienor to the risk of adverse claims or litigation. The following title standards express the practice considered reasonable by members of the Real Estate Bar Association for Massachusetts. This standard of reasonableness is intended to assist the conveyancer in determining if title is marketable. This is not necessarily the same standard that the Land Court will apply consistent with its statutory obligation under M.G.L. Chapter 185. While every effort has been made to maintain consistent standards for both recorded and registered land, there are instances in which the two sets of standards diverge. When dealing with registered land the conveyancer should always review the applicable Land Court Guidelines.
>
> When a conveyancer encounters a situation that he or she believes to constitute a defect in title, it is recommended that the conveyancer contact the prior conveyancing attorney to determine if there are facts or circumstances not apparent from the record that would make title marketable under these standards or otherwise.
>
> To achieve uniformity and harmony in the practice of conveyancing, every purchase and sale agreement should contain the following provision: "Any matter which is the subject of a title, practice or ethical standard of the Real Estate Bar Association for Massachusetts at the time for delivery of the deed shall be governed by said standard to the extent applicable".

WHAT IS INSURABLE TITLE?

Title Insurance Policy Forms.

The customary forms of title insurance policies, both owner's and lender's, issued in Massachusetts are based upon the American Land Title Association forms adopted by most, if not all the title insurance companies operating in Massachusetts. Since the introduction of title insurance more broadly into the Massachusetts real estate conveyancing marketplace starting the 1980s, the forms of ALTA policies have changed over the years but, starting in the late 1990s, they have bifurcated into two basic forms: a standard lender's and owner's policies (used predominantly for non-residential properties and transactions) and extended coverage lender's and homeowner's policies (used for 1-4 family residential properties and transactions). The standard policies provide fewer coverages regarding matters that are not matters of title traditionally covered by title insurance while the expanded coverage policies provide additional coverages that do go beyond matters of title traditionally covered by title insurance prior to the late 1990s. For purposes of this seminar, we will refer to the latest version of the ALTA policies now entering the marketplace as the basic coverages relating to marketable title have not changed all that much over the years.

Who and What Are Being Insured?

2021 ALTA Owner's Policy

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, Old Republic National Title Insurance Company, a Florida corporation (the "Company"), insures as of the Date of Policy and, to the extent stated in Covered Risks 9 and 10, after the Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. The Title being vested other than as stated in Schedule A.

2. Any defect in or lien or encumbrance on the Title. Covered Risk 2 includes [certain enumerated examples of defects, liens or encumbrances which have been omitted from these materials to save space except for paragraph c, which is a new form of survey coverage]:

. . .

c. the effect on the Title of an encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment (including an encroachment of an improvement across the boundary lines of the Land), but only if the encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment would have been disclosed by an accurate and complete land title survey of the Land.

3. Unmarketable Title.

. . .

9. The Title being vested other than as stated in Schedule A, the Title being defective, or the effect of a court order providing an alternative remedy [resulting from certain described bankruptcy or insolvency proceedings regarding fraudulent conveyances and voidable preferences which have been omitted to save space].

The **definition of "Unmarketable Title"** is provided in the Definitions section of the Conditions of the standard policy and that definition is "The Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or a lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title." As you'll see below, the definition of "unmarketable" title in the Homeowner's Policy is not as detailed and states only "which allows someone else to refuse to perform a contract to purchase, lease, or make a mortgage loan on the Land." The distinction can be important when dealing with the standard purchase and sale agreements in Mass, which routinely require "good clear record and marketable title" as opposed to just "marketable title."

2021 ALTA Homeowner's Policy

COVERAGE STATEMENT

SUBJECT TO THE PROVISIONS SET FORTH BELOW, We insure You against loss or damage resulting from one or more of the Covered Risks if the matter creating the risk exists on the Date of Policy or, to the extent expressly stated in any Covered Risk, after the Date of Policy. We will also pay the costs, attorneys' fees, and expenses provided for under this policy.

Your insurance is effective on the Date of Policy.

This policy covers You only if the Land is improved with an existing one-to-four family residence and each party named in Item 1 of Schedule A is a Natural Person or Estate Planning Entity.

Your insurance is further limited by all of the following:

- Amount of Insurance
- For Covered Risks 16, 18, 19, and 21, Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A
- Exceptions from Coverage in Schedule B
- Our Duty to Defend against Legal Actions
- Exclusions from Coverage
- Conditions

COVERED RISKS

1. Someone else owns an interest in Your Title.

. . .

7. Your Title is defective. Some examples of title defects are:
    a. someone else's failure to have authorized a transfer or conveyance of Your Title
    b. a defective judicial or administrative proceeding.
    c. a document, including an electronic document, on which Your Title is based:
        i. was signed using a falsified, expired, or otherwise invalid power of attorney;
        ii. was not properly authorized, executed, created, signed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered; or
        iii. was not properly filed, recorded, or indexed in the Public Records.
    d. the repudiation of an electronic signature by a person that executed a document because the electronic signature on the document was not valid under applicable electronic transactions law.
8. Someone else has a lien on Your Title.
9. Someone else has an encumbrance on Your Title.

. . .

29. Your Title is unmarketable, which allows someone else to refuse to perform a contract to purchase, lease, or make a mortgage loan on the Land.

Schedule A of the policy.

The policy information for each particular policy is generally contained in a **Schedule A**. This information includes the policy number, the date of the policy (usually the recording date of the deed and/or mortgage), the amount of insurance, the named insured(s) and (in the Loan policy) the parties in whom the title to the property is vested, the estate or interest being insured (usually fee simple as to the owner's estate and the mortgage interest as to the lender), and basic property information, such as the address of the property and, in the case of a condominium, the unit number and condominium name.

While the full description of the property may be placed on **Schedule A** if it is short enough, customarily, the property description is contained in a **Schedule A Description** sheet or an **Exhibit** sheet. It is important to note that the **Description** of the property to be insured should generally be limited to the **actual description of the land** (together with the buildings thereon) by metes and bounds or by references to lots on recorded plans.

Acreage or area should not be included. Appurtenant rights, such as access easements, may be included but generally only if the validity and current enforceability of those rights has been specifically searched and verified. If matters to which the property is subject (such as easements, restrictions, covenants, condo docs, etc.) appear in the deed and are copied into the policy description, such matters MUST also be included as specific exceptions on Schedule B of the policy. Title references should not be included in the policy description either unless the agent has verified the accuracy of the title reference (title references are often wrong).

Schedule B of the Policy.

Matters listed on **Schedule B** are excepted from coverage by virtue of the following clause printed at the top of the **Schedule B**:

This policy does not insure against loss or damage arising by reason of the following:

The list of matters placed in **Schedule B** complete the sentence and, thus, constitute those matters for which the policy does not provide coverage. Because the listing of any matters in **Schedule B** is the completion of that clasuse, it is not necessary to start a **Schedule B exception** with the words "subject to" but that is fairly common to see in agent-issued policies and is usually not an issue. Just the listing of the matter itself (such as an easement) together with identifying information (such as the parties to it and, perhaps, its subject matter, such as "utility easement" or "drainage easement")[1] and recording information (book and page and the date of the instrument or, preferably, the date of recording[2]) is sufficient to except it from coverage.

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[1] Although one must, of course, be careful if characterizing the nature of an encumbrance to do so accurately.

[2] Generally, the date of recording is more significant than the date of the instrument as the Massachusetts recording priority system is based on who gets to the Registry of Deeds first, not who signed the document first.

Originally, the ALTA form of **Schedule B** did not contain any pre-printed exceptions. The top of the **Schedule B** merely began with the disclaimer statement referred to above: After that disclaimer statement, specific exceptions as to title matters not to be insured would be listed. Over time, some pre-printed exceptions began to appear and were shown on the **Schedule B** as **"General Exceptions"** or **"Standard Exceptions"**. Like the **Exclusions From Coverage** appearing in the policy jacket, these **"General" or "Standard" Exceptions** dealt primarily with matters which a customary title search would not normally cover or discover. Although the precise wording may be somewhat different from company to company, the more common pre-printed **Standard Exceptions** in the current **Schedule B** forms are as follows:

1. Rights or claims of present tenants, lessees or parties in possession not shown by the public record.

2. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey and inspection of the premises would disclose, and which are not shown by public records.

3. Any lien, or rights to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records.

4. Liens for municipal taxes and assessments which become due and payable after the date of this policy.

After these **Standard Exceptions**, any **"Special Exceptions"** revealed by the title search or a plot plan or survey will be listed in the **Schedule B.** In both commercial and residential transactions, most of the affirmative coverages and endorsements (most of which provide standardized forms of affirmative coverage) a title insurance company will be asked to provide to an insured will relate to either **Standard or Special Exceptions** appearing in **Schedule B** rather than to **Exclusions From Coverage** contained in the jacket of the policy.

Note that the **Schedule B** does not state that anything contained in it is a defect, lien or encumbrance on the insured's title. It is simply a schedule by which the title insurance company identifies certain matters against which it will not insure. To be sure, many times **Schedule B** matters do affect the title in some way and they may, indeed, be deemed to be defects, liens or encumbrances. However, based on the character of a title insurance policy as a **contract of indemnity** for loss, the title insurance company may want to take exception for matters which may or may not necessarily affect the title, or the use or possession of the property as an incident of that title, but the company sees some risk of claim, litigation, loss or controversy and seeks to eliminate its exposure to paying for the consequences of same. In other cases, the company may be seeking by a particular **Schedule B** exception to clarify, define or limit a particular insuring provision. In still other cases, the company may be placing a particular exception in **Schedule B** in order to provide some affirmative coverage for that matter upon the request of the insured. Thus, the **Schedule B** form is not only a form that contains **Exceptions From Coverage**, but it may also be used to recite **affirmative coverages** over certain matters that might otherwise be excluded or excepted from coverage.

In both residential and commercial transactions, it is quite common that the lender will request that the **Standard Exceptions** (other than the tax lien exception) be deleted from a Loan policy.

Insurable Title.

In its basic nomenclature, insurable title is a title to real property which a title insurance company issues or authorizes the issuance of a title insurance policy. However, as discussed above, title insurance policies routinely contain certain exclusions from coverage, conditions and Schedule B exceptions (both standard and specific) that limit the coverages provided under the "Covered Risks".

With every title issue presented, a title insurance underwriter must be mindful of all of the Covered Risks, but, in most cases, especially Covered Risks relating to whether the title issues raise a question about:

(1) title to the estate or interest being properly vested in the Seller or Mortgagor and, as a result of the transaction to be insured, will be properly vested as will be described in Schedule A of the policy to be issued;

(2) the issue constituting a defect in or lien or encumbrance on the title; and

(3) the issue marketability of the title.

To a large degree, these determinations are also going to be governed by the law regarding marketability of title as discussed above, the law relating to any given title issue and REBA Title Standards because the definition of unmarketability of title in the forms of title insurance policies in use over the last 20+ years, which is defined in relation to matters that would allow "a prospective purchaser or lessee of the Title or a lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title." See the title policy provisions discussed above.

Certainly, if title is determined under applicable law and REBA Title Standards[i] to be "good clear record and marketable title," the title will be insurable as well.

Although we often hear that a buyer or lender is looking for a "clean policy," i.e., a policy with absolutely no exceptions in Schedule B, it is increasingly rare that real property in Massachusetts has no exceptions to title. Indeed, purchase and sale agreement forms routinely allow for certain exceptions to be acceptable to the buyer (such as utility easements and other encumbrances that do not affect use and enjoyment of the property) and those matters, if appearing in the record title or revealed by a survey and inspection of the property will be taken as Special Exceptions in the title insurance policy but that is routinely acceptable to buyers and lenders and constitutes "insurable title."

However, "**Insurable Title**" also refers to the issuance of a policy with coverage over a known title matter that may call into question whether the title is "good clear record and marketable title." In such cases, the affirmative coverage can take the form of not taking an exception for the matter, taking an exception and providing specific affirmative coverage or taking exception for the matter and providing affirmative coverage by means of standard ALTA Endorsement relating to the matter at issue.

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[i] Also, always be mindful of the Land Court Guidelines for Registered Land promulgated by the Land Court in 2009 as supplemented by various Memoranda by the Chief Title Examiner in the years since. In addition to providing guidance for registered land, they can also be helpful on issues that may not be covered by REBA Title Standards. At the same time, as to some matters, the Land Court Guidelines vary somewhat from the respective REBA Title Standard.

Indemnity and Undertaking Letters.

In the last 25 years or so, as more and more owners of property have been smart enough to listen to their closing attorneys and purchase owner's title insurance policies, when questions or controversies arise with respect to title issues, it has become more and more common for the current transaction title insurance company to insure without exception[ii] for the matter and allow the transaction to proceed based upon an indemnity or indemnity and undertaking letter from the current owner's title insurance company.

Whether the letter will be just an indemnity or will need to be an indemnity and undertaking letter depends on the nature of the title issue and a discussion between underwriting counsels at the respective companies.

More often than not, if the matter is one that, under the circumstances, cannot reasonably be expected to result in an affirmative claim against the title and the matter will expire within a reasonably short period of time, a letter with just an indemnity may be all that is required for the current transaction title insurance company to issue a policy without exception. The classic example, nowadays, would be an undischarged or improperly discharged prior owner mortgage with a maturity date that has already passed but has not quite reached the five years from maturity date (or is within, say, two or three years from the expiration of 35-years from the recording of a mortgage with no stated maturity date).

On the other hand, if the matter presents a genuine risk of a claim against the title or presents a marketability of title issue because the record title is not clear and not resolved by applicable law, title standards or, when applicable, Land Court Guidelines and the issue will not otherwise expire as title matter within a reasonable time, then an indemnity letter with undertaking will usually be required.

Indemnity and undertaking letters vary a bit from Company to Company but a sample of the content of an Old Republic National Title Insurance Company letter appears on the next page.

[ii] Although on occasion, the current transaction policy may issue with an exception for the matter and affirmative coverage against loss or damage incurred as a result of the matter.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

35 New England Business Center, Andover, MA 01810 | T: 800.370.6466

[date]

VIA EMAIL (email address)
[Underwriting Counsel]
********** Title Insurance Company
[Address of Title Insurance Company

Policy No.: ***SV-409****, dated March 26, 2004 in the amount of $340,000.00***
Property: ***284 *********, Street, Beverly, MA***
Insured: ***John R******

Dear **********:

Old Republic National Title Insurance Company hereby agrees to indemnify and hold harmless ********** Title Insurance Company ("**********" or "your Company") for all actual loss suffered by it as a result of claims due to the issuance of ********** policies on the above-referenced premises by your agent, **********, and arising from the following:

Mortgage from **** and ****** to MERS as nominee for North American Mortgage Company in the original principal amount of $160,000.00 dated April 3, 2001 and recorded on April 12, 2001 at the Essex South Registry of Deeds in Book ******, Page ***, as affected by a discharge from North American Mortgage Company recorded at said Registry of Deeds in Book *****, Page **.***

This letter of indemnity extends to loss resulting from unmarketability of title relating to said encumbrances or defects and to any subsequent policies of title insurance issued by your Company on the above property. Furthermore, Old Republic National Title Insurance Company agrees that it will undertake reasonable efforts to correct said defects in a timely manner, following which the Company's obligations hereunder shall terminate. This agreement is made with the provision that you notify Old Republic National Title Insurance Company in writing of any notice of claim in the matter which your Company receives within a reasonable time following your receipt of said notice.

This indemnity is provided only so long as there is no hold back of any of our insured's proceeds in regard to the matter listed above. If any such hold back is made or required, then this indemnity letter is null and void. If the Seller in the current transaction is not our Insured then this letter of indemnity shall be null and void.

Best Regards,
[signature]
[name and position]

cc: [Agents and attorneys involved]