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UNDERWRITING BULLETIN

MASSACHUSETTS

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To: National and Multi-State Agents of WFG
From: Ward P. Graham, Esq., Senior Underwriting Counsel (New England)
Date: July 15, 2011

RE: Guidance for Conducting Real Estate Transactions in Massachusetts in Compliance with Real Estate Bar Association for Massachusetts, Inc. v. National Real Estate Information Services, 459 Mass. 512, 946 N.E.2d 665, 2011 WL 1520142 (Apr. 25, 2011)

As you may be aware, the Supreme Judicial Court of Massachusetts (SJC) recently handed down its decision in the subject lawsuit between Real Estate Bar Association for Massachusetts, Inc. ("REBA") and National Real Estate Information Services ("NREIS"). In this much anticipated decision, the SJC has outlined the aspects of a real estate transaction that constitute the practice of law in Massachusetts and, therefore, must be performed by an independent Massachusetts-licensed attorney. At the same time, the Court also provided guidance as to what components of a Massachusetts real estate transaction may be performed by non-attorney individuals and companies.

A. The Questions Presented.

It is important to keep in mind that the SJC decision does not resolve the litigation in the REBA v. NREIS case. The main case is still pending in the federal court system in Massachusetts where the 1st Circuit Court of Appeals vacated the federal District Court's summary judgment and award of attorneys fees to NREIS.¹ The SJC decision resulted from the certification by the 1st Circuit Court of Appeals of two questions regarding Massachusetts law deemed necessary to decide the main issue in the underlying case under appeal in that court, which is whether NREIS is engaging in the unauthorized practice of law in conducting real estate transactions in Massachusetts in conjunction with local attorneys it retains simply to handle the "closings". The two questions certified to the SJC were:

¹ Real Estate Bar Ass'n for Mass., Inc. v. National Real Estate Info. Servs., 608 F.3d 110 (1st Cir.2010)(hereafter, "REBA v. NREIS [1st Cir.]"). The Circuit Court "vacated the District Court judgment on the unauthorized practice of law claim" because it found "no controlling precedent that establishes a definition for 'conveyancing' or the extent of activities that constitute conveyancing," *id.*, at 118, prompting the court to certify two questions on that issue to the SJC.

"1. Whether NREIS's activities, either in whole or in part, based on the record in this case and as described in the parties' filings, constitute the unauthorized practice of law in violation of Mass. Gen. Laws ch. 221, §§ 46 et seq."

"2. Whether NREIS's activities, in contracting with Massachusetts attorneys to attend [real estate] closings, violate Mass. Gen. Laws ch. 221, §§ 46 et seq."²

B. The SJC's General Conclusion.

Because the federal District Court's decision was based on cross motions for summary judgment, the evidence on the record as to the details of NREIS's business practices was by no means complete. Accordingly, the court could not answer both questions definitively as particularly related to NREIS's practices. However, the court was able to take the basic facts presented by the summary judgment records and documentary submissions and come to some fundamental conclusions regarding which types of activities that are routinely part of a real estate transaction constitute the practice of law and which do not. Essentially, those activities that do not constitute the practice of law were determined to be more in the nature of ministerial or clerical functions that do not require the exercise of legal skills, legal judgment or legal expertise or do not constitute legal representation of a client.

The Court stated its basic conclusions as follows:

For the reasons stated below, we conclude that certain of the real estate settlement activities undertaken by NREIS do not constitute the unauthorized practice of law, but we cannot determine, based on the record before us, whether other of the described settlement activities may do so. As to the second question, the limitations of the record prevent us from providing a definitive answer. Nevertheless, we conclude that **the closing or settlement of the types of real estate transactions described in the record require not only the presence but the substantive participation of an attorney on behalf of the mortgage lender, and that certain services connected with real property conveyances constitute the practice of law in Massachusetts.**³ [Emphasis added.]

C. How must real estate transactions be conducted in Massachusetts in light of REBA v. NREIS [SJC]?

As a result of the SJC's discussion of various components of a real estate transaction (including both refinances and purchases) in relation to the practice of law questions posed by the federal Court of Appeals, we can provide the following guidelines to our national and multi-state agents as to what real estate closing activities they may perform without the involvement of an attorney and what activities must be performed or supervised by an independent, Massachusetts-licensed attorney.⁴

² Id., at 119-120.

³ Real Estate Bar Ass'n for Mass., Inc. v. National Real Estate Info. Servs., 459 Mass. 512, 514, 946 N.E.2d 665, 671 (2011) (hereafter, "REBA v. NREIS [SJC]"). A full copy of the decision is available for reference at the WFG website using the following link:

⁴ References to "attorney" or "attorneys" in this memo refer to independent Massachusetts-licensed attorneys or law firms.

1. Activities that may be undertaken by a Non-attorney Real Estate Closing Settlement Agents or Non-attorney Vendors with which they contract:

a. Facilitating Transactions. Facilitating (processing, coordinating and managing) mortgage loan transactions for Lender customers.

b. Obtaining records and reports. Ordering and/or obtaining third party or public records reports, certificates, documents and information, such as title abstracts/examinations and associated reports, municipal lien certificates and other municipal lien information, property appraisals, flood reports, mortgage payoffs, etc..

Note: It is possible for a non-attorney settlement agent or vendor to perform the title abstracting (a/k/a title examining) services but, as explained below, it is then necessary to have an attorney (the Closing Attorney or other Title Reviewing Attorney) review the abstract and render an opinion or report (and a title certification to the purchaser under M.G.L. c. 93, §70, if the transaction is a purchase) on the status of title for purposes of title clearing and assuring proper title is conveyed or mortgaged.

c. Title Examining and Preparation of Title Abstracts. Surprisingly, notwithstanding the importance of knowing enough about local law and practice to not only know how to search for and retrieve documents in the local land records affecting title and interests in real estate but also to determine whether they are relevant enough to mention or include copies of in a title report, the SJC found that such activities are “commonly performed by competent nonlawyer professionals”⁵ and do not constitute the practice of law. Accordingly, performing a title examination and preparing the abstract of it can be done by a non-attorney settlement agent or vendor hired by a non-attorney settlement agent . However, as will be discussed, reviewing and acting upon the title abstract for issuance of a title insurance commitment and policy and other matters associated with the mortgage transaction requires the involvement of an attorney.

d. Transmitting Closing Documents and Information. Transmitting to the Closing Attorney (for review and possible recommendations for action) the loan closing documents and/or information received from the lender, including such documents as may be reasonably necessary for the Closing Attorney to understand the transaction (such as the Loan Commitment Letter).

e. Selecting and Contracting with Closing and Title Reviewing Attorneys. Selecting and contracting with Closing and/or Title-Reviewing Attorneys on behalf of the Lender and connecting the Attorneys to the Lender to enable the establishment of an attorney-client relationship for each transaction. While a non-attorney settlement agent may, on behalf of its Lender customer, monitor and specify *what* legal services

⁵ *Id.*, 459 Mass. at 521, 946 N.E.2d at 676.

are to be performed by a Closing and/or Title Reviewing Attorney in accordance with the SJC's decision, it must not purport to control or direct *how* legal services are to be performed on behalf of the Lender as a client of the attorney.⁶

f. Preparing and Filling Out Standard Forms. Preparing or filling out settlement statements (including HUD-1 and HUD-1A) and other standard government forms or loan closing documents where no legal advice or legal determination is necessary to decide on the appropriateness of the form and/or the information or content to be entered.

g. Escrow Receipts and Disbursements. This is one of the activities that the court could not definitively opine upon because of the scant record. The Court did specifically state that the handling of escrow receipts and disbursements is not in and of itself the practice of law.⁷ However, based on the discussion of this topic in the decision, it is also clear that the Court considers the closing attorney (usually, the mortgagee's attorney) to be responsible for assuring compliance with the Massachusetts Good Funds Statute, not only with respect to the receipt of good funds prior to recording a mortgage, but also with respect to the disbursement of those funds to or for the benefit of the mortgagor.⁸

⁶ Due to the latter issue and the fact that the unauthorized practice of law statutes at issue in the REBA v. NREIS case prohibits the practice of law by business corporations, such attorney cannot be an employee of a non-attorney settlement agent or any other business entity that is not controlled by one or more Massachusetts attorneys.

⁷ REBA v. NREIS [SJC], 459 Mass. at 526, 946 N.E.2d at 680.

⁸ *Id.*, 459 Mass. at 526-527, 946 N.E.2d at 680. M.G.L. c. 183, § 63B, provides, in relevant part, as follows:

"No mortgagee who makes a loan to be secured by a mortgage or lien on real estate located in the commonwealth in conjunction with which, a mortgage deed evidencing the same is to be recorded in a registry of deeds or registry district in the commonwealth, shall deliver said deed or cause the same to be delivered into the possession of such registry of deeds or registry district for the purpose of the recording thereof unless prior to the time said [mortgage] deed is so delivered for recording, said mortgagee has caused the full amount of the proceeds of such loan due to the mortgagor pursuant to the settlement statement relevant thereto given to said mortgagor or in the instance of any such loan in which the full amount of the proceeds due to the mortgagor pursuant to the terms thereof are not to be advanced prior to said recording, so much thereof as is designated in the loan agreement, to be transferred to the mortgagor, the mortgagor's attorney or the mortgagee's attorney in the form of a certified check, ..., or by a [wire] transfer of funds [etc.]...." [Emphasis added.]

Note that the statute only contemplates the receipt and handling of escrow funds by "the mortgagor's attorney or the mortgagee's attorney." There is no accommodation for the handling of escrows by a non-attorney. The statute is designed to require the mortgagee to fund the loan transaction so that the funds are available for disbursement before the mortgagor's title interests have been encumbered by the recording of the mortgage. The Court states that the statute "requires a lender-mortgagee . . . to disburse all mortgage proceeds due to a borrower-mortgagor either to the mortgagor directly or to an attorney for the mortgagor or for the mortgagee." *Id.* At the same time, the Court says that "NREIS presumably is permitted to assist lenders as their agent in fulfilling this statutory obligation," *Id.*, 459 Mass. at 527, 946 N.E.2d at 680, (i.e., getting the proceeds to the attorney) but that post-closing disbursement of mortgage proceeds by NREIS itself may violate the good funds statute depending on when it happens and "to

It appears that initially receiving loan funds and transmitting them to the attorney “for the mortgagor or mortgagee” (generally, the closing attorney) does not violate the Good Funds statute but the court left open the possibility that NREIS’s disbursing funds, even in a refinance transaction (NREIS claimed to not be doing so for purchases) could violate the Good Funds Statute. While not specifically stated, part of the reason for this possibility is the closing attorney’s responsibility for assuring compliance with transactional and legal requirements, including those relating to disbursement of closing proceeds and title clearing by paying off mortgages and liens.⁹

Where does that leave us?

(1) Purchase Transactions. Given the Court’s discussion of possible Good Funds violations even in refinance transactions and its tacit approval of NREIS’s stated practice of providing mortgage loan funds to the closing attorney for appropriate disbursement in all purchase transactions, it is our opinion that it is necessary to provide the closing attorney (or, under certain circumstances, an attorney other than the closing attorney who qualifies as the “mortgagor’s” or “mortgagee’s” attorney) with the loan proceeds in order to handle the disbursements, particularly as to title clearing matters such as paying off liens and mortgages as well as disbursing seller’s proceeds and, when the occasion arises, holding any proceeds in escrow pending post-closing resolution of any title or other legal matters.

(2) Refinances. Bearing in mind the overall responsibility of the closing attorney to assure compliance with various legal requirements associated with a real estate transaction, including a mortgage refinance, it is our opinion that an attorney must be involved in the handling of disbursements for a mortgage refinance as well. However, given the Court’s inability (due to the inadequate record before it) to identify specifically what, if any, aspects of the disbursement of refinance loan proceeds may constitute a violation of the Good Funds Statute if done by a non-attorney settlement agent, it is our opinion that the attorney’s involvement may take one of two forms:

(a) Actual Receipt and Disbursement by Attorney – The attorney receiving the mortgage loan proceeds directly from the lender or via intermediary transmittal from a non-attorney settlement agent and actually disbursing the

whom the proceeds are disbursed,” *Id.*, although the record was not clear enough for the Court to say definitively.

⁹ While the statute talks about “proceeds due to the borrower-mortgagor”, that language has been construed by a local bankruptcy decision (predicting Massachusetts law on the point) to mean not only net proceeds to the mortgagor, if any, but also, as one would expect, amounts to pay closing costs and pay off existing mortgages and liens on behalf of the mortgagor. *Roberts v. Crowley*, 538 F.Supp.2d 413 (D.Mass. 2008).

loan proceeds in accordance with the loan documentation (including the HUD Settlement Statement) and transactional requirements, or

(b) Supervision by Attorney of Receipt and Disbursement by a non-attorney settlement agent – The attorney supervising the receipt and disbursement of the loan proceeds by a non-attorney settlement agent so as to assure compliance with the loan documentation (including the HUD Settlement Statement) and transactional requirements in a manner similar to that utilized in South Carolina¹⁰ by reviewing, for example, the loan documents, title report and/or title insurance commitment, HUD Settlement Statement, disbursement ledger and/or disbursement checks and transmittal letters or wire confirmations, and any other documents deemed appropriate by the closing attorney to assure compliance with the Good Funds Statute and other legal requirements of the particular transaction.

h. Post-Closing Activities – Reviewing Closing Documents for Compliance.

Retrieving and reviewing the mortgage loan transaction documents to ensure valid execution, witnessing and acknowledgment and to ensure completeness and compliance with the Lender’s loan closing instructions.

i. Post-Closing activities – Recording Documents. The SJC determined that delivering the mortgage and any other documents to be recorded to the appropriate registry of deeds for recording is not the practice of law and need not necessarily be done by or through the closing attorney. However, it is both prudent and preferable to have the closing attorney tend to the recording in order to ensure that the documents are properly recorded, especially if Land Court Registered Land is involved.¹¹

In addition, with the more extensive involvement of a Massachusetts-licensed attorney now required even in mortgage refinance closings, it is highly advisable that the local closing attorney used by a non-attorney settlement agent also attend to the final title rundown and recording of the mortgage. As pointed out later, an attorney will have to review the final title rundown report anyway, so he or she might as well attend to the final rundown along with the recording of the mortgage.¹²

¹⁰ Pursuant to the decision of the South Carolina Supreme Court in Doe Law Firm v. Richardson, 371 S.C. 14, 636 S.E.2d 866 (2006).

¹¹ There is a bifurcated land records system in Massachusetts: (1) regular land records administered by county registries of deeds and (2) court-supervised registered land records administered by the Land Court through its district offices located in each registry of deeds but separated from the regular records recording office. The rules and regulations for registered land are highly technical and the simplest violation of them can result in a document being rejected for registration or an existing title encumbrance remaining on the title.

¹² As will be discussed, the commitment and final title insurance policy must be based on a review and report of the title by an attorney (presumably the closing attorney) anyway. It may be more efficient and cost effective to have the attorney attend to the final title rundown along with the recording of the mortgage and any other title documents required for a particular transaction.

For a number of reasons, under no circumstances should a mortgage or other document significant to the perfection of the mortgagee's interest be mailed to a Registry of Deeds in Massachusetts.¹³

j. Issuance of title insurance commitments and the final policy. Like handling escrows and disbursements, issuance of title insurance commitments and the final policy by a non-attorney settlement agent is not in and of itself the practice of law. However, as will be discussed below, the issuance of commitments and policies must be based on (1) a review of the title by an attorney and (2) a report or opinion by the attorney as to the status of title and any recommendations about the title for purposes of the commitment and policy as well as for purposes of the transaction and any title clearing or curative matters.¹⁴

k. Transmitting Final Loan Package. A non-attorney settlement agent can clearly handle transmitting the final loan document package back to the Lender.

2. Activities that must be performed by an independent Massachusetts-licensed attorney.

a. Reviewing and Making Recommendations on the Title Examination or Title Abstract. While performing a title examination and preparing a title abstract are not the practice of law, reviewing the examination or abstract, determining the legal status of title based on it and rendering opinions and transactional recommendations based on it are included in the practice of law in a real estate transaction. As a result, the following activities must be performed by an attorney:

- (1) Rendering a report or opinion on the legal status of the title and whether it is marketable and/or insurable.
- (2) Making recommendations as to the necessity and nature of curative measures for any adverse matters affecting the title that are necessary to ensure a marketable or "insurable" title as required by the lender.
- (3) Recommending what, if any, legal documents may be necessary in order to ensure the quality of title required by the lender and the lien priority, validity and enforceability of the mortgage.
- (4) Making recommendations as to the requirements and exceptions to be placed in a title insurance commitment and/or final policy based upon the legal status of title before and after the closing.

¹³ Mailed documents are often lost or misplaced, routinely delayed in recording and sometimes rejected for recording due to some infirmity in the content or even formatting of the document. In-hand delivery to the registry recording/registration desk (or even electronic recording in the few registries where available) is highly preferable, if not essential, in Massachusetts.

¹⁴ The review, report and recommendations can be done by the closing attorney retained by a non-attorney settlement agent or by a separate Massachusetts-licensed attorney but it cannot be done by an attorney employed by the non-attorney settlement agent or another business entity that is not owned or controlled by a Massachusetts-licensed attorney or law firm.

b. Clearing Title or Supervising the Clearing of Title. Undertaking or supervising the undertaking of measures that would require the provision of legal services in order to resolve title defects or encumbrances, such as evaluating the legal rights of others, determining the appropriate actions to take or documents to draft, drafting or reviewing any necessary documents and assuring that such documents are duly recorded or registered.

c. Drafting Documents Significant to the Title or Legal Interests of the Parties. Drafting deeds and other non-standard documents to address particular title issues or effectuate the mortgage transaction or release of title interests, liens or encumbrances, such as releases, subordinations, affidavits, certificates, etc.

d. Conducting the Closing, including Pre-Closing Review of Closing Documents. Conducting the Closing in a manner in which the attorney plays “a meaningful role” beyond being “present at the closing to [merely] hand legal documents that the attorney may never have seen before to the parties for signature, and to witness the signatures”.¹⁵ The attorney must have an adequate opportunity to review the closing documents and, if not also the title reviewing attorney, the title report and/or Commitment as well as the loan closing instructions in order to ensure, among other things, that the mortgage transaction is properly effectuated. The attorney must also be prepared to answer borrowers’ questions regarding the mortgage loan closing documents and, under the new Massachusetts Homestead Act, provide a mandatory disclosure regarding the borrowers’ homestead rights.¹⁶

f. Escrow Receipts and Disbursements.

(1) Purchase Transactions. As discussed above in Paragraph 1.g.(1), it appears from the SJC’s discussion of the Massachusetts Good Funds Statute that an attorney must be involved in the handling of escrow funds and disbursements in a ***purchase transaction***. In such a case, as the Court pointed out, the closing attorney is not only responsible for ensuring “a valid transfer of the interests being conveyed at the closing” but also for ensuring the proper “transfer of the consideration for the conveyance-- typically mortgage loan proceeds in the case of the mortgage transactions at issue”.¹⁷

(2) Refinance Transactions. As discussed above in Paragraph 1.g.(2), In a ***refinance transaction***, the closing attorney need not necessarily handle the escrow funds and disbursements. Of course, given the Court’s discussion of the overall responsibility of the closing attorney to assure fulfillment of all the legal requirements of a transaction, including a refinance, if there are unusual circumstances, such as dealing with holding and disbursing escrow funds as part

¹⁵ REBA v. NREIS [SJC], supra, 459 Mass. at 534, 946 N.E.2d at 685.

¹⁶ M.G.L. c. 188, §14, effective March 16, 2011.

¹⁷ REBA v. NREIS [SJC], supra, 459 Mass. at 536, 946 N.E.2d at 687.

of a negotiated arrangement with a lien creditor to release a lien or a situation where an escrow of borrower's funds will be held post-closing for some reason (e.g., post-closing title clearing), then it may be necessary for the attorney to hold and disburse at least those funds if not handle the receipt and disbursement of all the loan funds.

In any event, even in a refinance transaction, the Closing Attorney should be at least supervising the receipt and disbursement of funds as described above in Paragraph 1.g.(2)(b).

g. As the SJC noted in REBA v. NREIS, an attorney for the mortgagee must also render a title certification to the borrower in a purchase transaction pursuant to M.G.L. c. 93, §70.¹⁸

D. Conclusion. As noted above and in the REBA v. NREIS [SJC] case itself, there are still some unanswered questions regarding the specific practices of NREIS and whether they violate either the unauthorized practice of law statutes or the Massachusetts Good Funds Statute. The case is now back in the federal court system and it is unclear at this stage whether the case will be remanded back to the District Court for further discovery and trial or whether the guidance provided by the SJC will be enough to cause the parties to settle.

Either way, the foregoing constitutes our best interpretation of the SJC decision in providing guidelines for a non-attorney settlement agent as to how real estate closings must be conducted in Massachusetts in order to avoid violation of these statutes. To the extent there are further developments in the case, particularly in relation to the handling of receipt and disbursement of escrow funds, we will keep you informed.

In the meantime, please do not hesitate to consult with any of the following underwriting counsel to discuss any questions or concerns you may have with the foregoing guidelines:

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¹⁸ REBA v. NREIS [SJC], *supra*, note 19, 459 Mass. at 523, 946 N.E.2d at 678, and note 46, 459 Mass. at 536, 946 N.E.2d at 687. NREIS claimed that it did not provide such title certifications but there is nothing in the case that indicates who was doing so. Presumably, the purchase mortgage closing attorneys to whom they claimed to be transmitting the loan funds were doing so.