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REBA v. NREIS: SJC Provides Guidance on the Role of Attorneys in Massachusetts Real Estate Transactions, But Questions Remain Unanswered

By: Giles L. Krill, Esq., May 20, 2011

Our Supreme Judicial Court (SJC) recently expounded on what does and does not constitute the unauthorized practice of law in Massachusetts real estate transactions. In The Real Estate Bar Association of Massachusetts, Inc. v. National Real Estate Information Services, 459 Mass. 512 (2011), the SJC considered certified questions of law from the U.S. First Circuit Court of Appeals following years of litigation in Federal court in which the Massachusetts Real Estate Bar Association (REBA) contends that National Real Estate Information Services (NREIS), a Pennsylvania corporation holding itself out as a “settlement services provider” for mortgage lenders, regularly violates the Massachusetts statute prohibiting the unauthorized practice of law.

In general, NREIS’ business model consists of drafting and gathering the pre-closing documents necessary for purchase money mortgage loan or refinancing transactions across the country, followed by attention to the post-closing recordings, funds disbursements, and the issuance of title insurance policies. At all times, NREIS acts on behalf of its lender clients. REBA characterizes such activities in Massachusetts as the practice of law by a non-lawyer. NREIS, on the other hand, characterizes its activities as purely clerical or ministerial in nature.

To make a long (and dense) story short, the SJC was unable to determine whether or not NREIS' activities, in whole or in part, constitute the unauthorized practice of law in Massachusetts. In reaching its decision, the SJC was confined to a summary judgment record developed in the United States District Court, which it found inconclusive. However, the SJC's analysis also suggested that certain aspects of NREIS' business *may* constitute the unauthorized practice of law, depending on facts not yet established.

So what do we know as a result of the REBA v. NREIS decision? We know that each of the following does not "in and of itself" constitute the practice of law: i) ordering title abstracts and other third party reports relating to the mortgaged premises; ii) preparing closing documents, such as HUD-1 settlement statements, which have "legal consequences" but do not constitute the offering of "legal advice" or "legal opinion"; iii) recording documents and disbursing loan proceeds; iv) issuing title insurance policies; and v) contracting with Massachusetts attorneys to attend closings on behalf of lenders. We also know that national settlement service providers such as NREIS engage in the unauthorized practice of law in Massachusetts if they render opinions on the legal status or marketability of title, undertake title clearing activities, or provide deeds and any other legal instruments that "affect significant legal rights and obligations." However, the SJC stated that the record contained no evidence of Massachusetts real estate transactions in which NREIS engaged in any of the activities specifically identified as the practice of law.

In perhaps the most significant aspect of the decision, the SJC stated that while it is not unlawful for a third party to hire an attorney to represent a client, attorneys hired by NREIS to attend closings on behalf of lenders must exercise independent supervision and control of the transactions. The SJC stated that a lawyer's analysis of legal title and oversight of the conveyance

of legal rights to real property is a necessary prong “in the continued integrity and reliability of the real property recording and registration systems.” If a lawyer simply serves as a witness and notary public at a real estate closing, “there would be little need for the attorney to be at the closing at all.” In addition to clarifying that it would be unlawful for settlement service providers to interpose themselves in the attorney-client relationship in abrogation of the defined role of attorneys in Massachusetts real estate transactions, the SJC also stated that the attorneys themselves “possess[] an ethical and professional obligation to ensure marketability of title regardless whether the closing attorney personally performs this analysis.”

So there you have it, so called “notary closings” -- in which national settlement service providers handle all substantive aspects of a mortgage financed real estate transaction and hire an attorney to attend the closing strictly for purposes of cloaking it with legitimacy -- are officially unlawful in Massachusetts; that is, assuming such transactions even exist, which has yet to be established in a court of law as far as the SJC is concerned. In other words, REBA may have won the battle, but the outcome of the war remains in doubt since the SJC did not categorically label any aspect of NREIS’ business as the unauthorized practice of law in Massachusetts. If REBA must resort to proving that national settlement service providers engage in the unauthorized practice of law on a case-by-case, factually intensive basis, it could be a costly enterprise and possibly a war of attrition.

On the other hand, the holding that a real estate closing must pass through the gateway of a Massachusetts attorney is a significant victory for REBA. Moving forward, national settlement service providers now have precedent that they cannot ignore, and Massachusetts attorneys who may or may not have accepted closing assignments to act, effectively, as a notary are now on notice

that they do so at their peril in light of the SJC's statements about a lawyer's professional and ethical obligations.

What remains to be seen is whether or not the business model of national settlement service providers is compatible with Massachusetts law, as clarified in the REBA v. NREIS decision. While there can be no doubt that a Massachusetts attorney must provide meaningful oversight of a Massachusetts real estate transaction, it is unclear at what point in the timeline of the transaction the lawyer needs to be brought in, notwithstanding that REBA would clearly prefer that all real estate transactions originate on the desk of a Massachusetts attorney. What if NREIS waits until the eleventh hour of the pre-closing period to hire a Massachusetts attorney, instructs the lawyer to review and comment on the closing package, and stands behind its confidence that the lawyer will be satisfied that the papers are in proper order for a conveyance of good and marketable title (subject only to the lawyer's review of a post-recording title abstract to ensure that no intervening encumbrances appeared of record)? The templates used in non-lawyer title abstracts customarily contain a cover sheet line item identifying "title vested in," a "subject to" list, and a miscellaneous "comments" section. What if NREIS simply forwards the title abstracts to its lender clients, who then elect to represent themselves *pro se* by analyzing the abstracts in-house? In the context of purchase money mortgage loan transactions, is it even possible for lenders to act *pro se* and comply with G.L. c. 93, § 70, which requires an attorney certification of title for the benefit of both the mortgagor and mortgagee? What if the lenders employ in-house counsel licensed in Massachusetts?

In short, the REBA v. NREIS decision affirmed the important and exclusive role that attorneys play in Massachusetts real estate transactions. However, a great deal of grey area

remains, and the decision is far from a death knell to national settlement service providers. Ultimately, mortgage lenders will need to decide whether national settlement service providers add value to mortgage financed real estate transactions or whether they are simply middlemen that need to be cut out of the equation in favor of Massachusetts attorneys. One would hope that the quality of the final product -- namely, real property conveyances backed by sound due diligence, legal advice, and fewer post-closing problems -- will be the driving force in this decision.

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