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MASSACHUSETTS SUPREME JUDICIAL COURT ISSUES OPINION REGARDING ROLE OF ATTORNEYS IN REAL ESTATE CLOSINGS

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Massachusetts' highest court recently ruled obliquely that real estate closings must have "substantive participation" by attorneys, but largely punted back to the federal appeals court, which had asked for guidance, the question of the allowable scope of non-attorney activities.

In *The Real Estate Bar Association for Massachusetts, Inc. v. National Real Estate Information Services*, SJC-10744 (April 25, 2011), the Supreme Judicial Court answered only one of the two questions certified by the United States Court of Appeals for the First Circuit. Members of the Massachusetts real estate bar, REBA, had filed a federal lawsuit alleging that an out-of-state "vendor manager" of real estate transactions, NREIS, engaged in the unauthorized practice of law by participating – in lieu of licensed Massachusetts attorneys – in various phases of real estate transactions. NREIS is a Pennsylvania-based business that describes itself as both a multi-state real estate settlement services provider and a title insurance agency. NREIS employs no Massachusetts attorneys and, instead, contracts with Massachusetts attorneys to attend closings throughout the state. According to the court, REBA "has a long history of attempting, though both legislation and litigation, to confine conveyancing activities in the Commonwealth to Massachusetts attorneys." The underlying lawsuit was such an attempt, this time by alleging that non-attorney participation in conveyancing constitutes unauthorized practice under Massachusetts statutory law.

NREIS prevailed in the trial court and REBA appealed to the First Circuit, which, in turn, asked the SJC to answer the following questions:

1. Does NREIS's participation in real estate transactions constitute the unauthorized practice of law?
2. May NREIS contract with attorneys to attend real estate closings and, if so, is mere attendance enough?

In NREIS, the SJC answered (1) "probabl[y] no" and (2) did not answer except to say that real estate transactions in Massachusetts as described in the record of this case, "require not only the presence but the substantive participation of an attorney on behalf of the mortgage lender."

However vague these answers, the SJC's decision offered a valuable discussion on the role of attorneys in real estate transactions in Massachusetts. As to the first question, the SJC focused much of its attention on the meaning of 'practice of law' in the context of conveyancing and, in so doing, divided NREIS's real estate services into a series of discreet activities. In arriving at the "probable no," the SJC found the following NREIS services did not constitute the 'practice of law': (1) contracting for title examination searches relating to specific properties to be performed by third parties; (2) obtaining other third-party reports or public records relating to those properties;

April 2011

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The take-away from the decision appears to be that while there are many tasks attendant to real estate conveyancing that need not be performed by an attorney, an attorney needs to be involved at the closing, and his or her participation must be “substantive,” whatever the First Circuit considers that to mean.

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(3) contracting with a third party to draft deeds for mortgage loan transactions if a lender so requests; (4) drafting Federal HUD-1 or HUD-1A settlement statements; (5) arranging for a Massachusetts attorney to attend a "closing" on behalf of the lender; (6) transmitting the lender's documents to the closing attorney prior to the actual closing, and reviewing those documents postclosing for proper execution; (7) ensuring the recording of documents related to the mortgage at the appropriate registry of deeds; and (8) disbursing settlement funds.

This discussion did nothing to change the fundamental contours of Massachusetts law regarding the duties of closing attorneys. Specifically, NREIS left untouched the long-standing rule that buyers and sellers rely at their own peril on the representations of lenders' attorneys. *Page v. Frazier*, 388 Mass. 55 (1982). Attorneys are still required to determine marketability of title. *Fall River Savings Bank v. Callahan*, 18 Mass. App. Ct. 76 (1984). At closing, attorneys have a duty to effectuate a valid transfer of interests being conveyed at the closing. *Matter of Franchitto*, 448 Mass. 1007 (2007). Presumably, this work still must be performed by attorneys after the NREIS decision.

With respect to the second question, the SJC's answer is even more muddled. The court initially punted by formulating the question as about the propriety of the provision of contract attorneys itself. The SJC claimed that that there was insufficient information on the record before it regarding the relationship between NREIS and the contract closing attorneys to determine whether "NREIS is itself actively directing and managing the establishment of legal rights of others," which would be unauthorized, or whether the relationship was "closer to one where a party places itself as an intermediary between an attorney and a client," which would not.

The continued analysis, which REBA has evidently seized upon as indication that it prevailed (see State Court Rules Attorneys Must Participate in Home Closings, *The Boston Globe*, April 25, 2011), concerns the conduct of a closing attorney, contract or otherwise. The SJC stated: "[w]e believe that a lawyer is a necessary participant at the closing. ...In other words, many of the activities that necessarily are included in conducting a closing constitute the practice of law and the person performing them must be an attorney." However frank this statement may appear, it is couched in a major disclaimer, as the court specifically declined to answer the question put to it – i.e. whether NREIS did anything wrong by contracting with an attorney for the sole purpose of attending the closing and handing over documents fully prepared by NREIS.

In NREIS, the SJC did its very best to decide as little as possible, and it succeeded. The take-away from the decision appears to be that while there are many tasks attendant to real estate conveyancing that need not be performed by an attorney, an attorney needs to be involved at the closing, and his or her participation must be "substantive," whatever the First Circuit considers that to mean.

To discuss your situation, and to learn how Looney & Grossman may be able to assist you, please contact Gabriel T. Dym, Esq., or Joseph S. Berman, Esq. at (617) 951-2800.