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Edward Bloom - Real Estate Bar Association of Mass. president's message: REBA's huge win at the SJC

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On my initial reading of the Supreme Judicial Court's (SJC) April 25th decision in *The Real Estate Bar Association of Massachusetts, Inc. v. National Real Estate Information Services (NREIS)*, I was disappointed with the fact that, based on the paucity of the records in the case, the SJC could not specifically pinpoint various discrete activities of NREIS as constituting the unauthorized practice of law. However, on a more careful second reading of this very complex, layered and detailed opinion of the SJC, I concluded that REBA had won a major victory for the homeowners of Massachusetts and the real estate bar.

To begin with, the SJC emphatically determined that Massachusetts is an "attorney" state in connection with all real estate closings. It completely rejected the notion of "witness or notary closings," where NREIS hires an attorney to be present at a real estate closing, who knows nothing about the transaction and is acting simply as a glorified notary public. In fact, the court stated that any attorney who would act in such a limited role would be violating his or her professional and ethical responsibilities.

The court refused to follow the lead of some states that do not require any attorney to conduct real estate closing, insisting that an attorney must be substantively involved in the closing or settlement of real estate transactions.

"The closing is where all parties in a real property conveyancing transaction come together to transfer their interests, and where the legal documents prepared for the conveyance are executed. ... The closing is thus a critical step in the transfer of title and the creation of significant legal and real property rights. Because this is so, we believe that a lawyer is a necessary participant at the closing to direct the proper transfer of title and consideration and to document the transaction, thereby protecting the private legal interests at stake as well as the public interest in the continued integrity and reliability of the real property recording and registration systems. ... 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. ... [W]e consider a closing attorney's professional and ethical responsibilities to require actions not only at the closing but before and after it as well."

While finding that many of NREIS's specific activities may not constitute the practice of law, such as ordering a title examination or disbursing mortgage funds, the court warned that in the first instance, delivering title services may constitute the practice of law when provided in conjunction with giving legal advice or providing legal opinions about the quality of title, and in the second instance, the court raised the specter that NREIS's activities in disbursing mortgage funds may not comply with the Good Funds Statute (G.L. c. 183, Â§63B). In addition, while the court found that NREIS's recording of the relevant documents at the appropriate registry of deeds does not constitute the

practice of law, it again warned that a post closing "rundown" of title to ensure that no encumbrances have been placed on the property prior to recording may constitute the practice of law as part of an overall determination of marketability of title.

One can only come away from a reading of the SJC's opinion with the strong belief that the business model of NREIS and other settlement service companies of its ilk operating in Massachusetts cannot avoid running afoul of the unauthorized practice of law statutes, about which the SJC emphatically said: "[L]imiting the practice of law to authorized members of the bar is not to protect attorneys from competition but rather to protect the public welfare."

For this victory, REBA members owe a huge debt of gratitude to REBA's legal counsel and the prime architect of our triumph, Doug Salveson, as well as to his REBA advisors, Bob Moriarty, Sam Baghdady, Steve Edwards, Paul Alphen, Tom Moriarty, Jon Davis and Mary Ryan. We are also grateful to the many bar associations, the attorney general's office, the registries of deeds and many others who filed amicus briefs with the SJC supporting REBA's position. Unlike the nightmare scenario in the movie "It's a Wonderful Life," this decision ensures that the Bedford Falls in which Massachusetts lawyers now live will not turn into Pottersville.

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