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The Massachusetts Focus

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Stewart Market Share Update

– Craig J. Celli, Esq.
Massachusetts State Manager

It has been the practice of Stewart's Boston office to update its agents about Stewart's market share growth in Massachusetts. Stewart is very proud to report that, as of the first quarter of 2010, Stewart has increased its market share to 14.7% (second in Massachusetts), almost doubling its percentage in less than four years.

I would like to thank you, our agents. Each time you complete a closing you have a choice as to which title insurance company's policy you will pull from the shelf. We appreciate each time that choice is Stewart.

The actual policy, from company to company, is essentially the same providing virtually the same protection and coverage. So we understand that it is so many other reasons as to why you work with one title insurance company as opposed to another. We understand that it takes excellent service and dedication. We need to be able to answer your title questions and help you complete transactions. We need to work with you to help your office grow. We need to provide support in any area of need.

I hope we are doing all these things, and please call on me at any time for any type of assistance.

Did You Catch That?

– Gary F. Casaly, Esq.
Special Counsel

Put on your thinking cap and clean your glasses. Below are a number of scenarios (a word I hate) — written a little bit like bar exam questions (I can hear the moans now) — that have hidden in them some salient facts that might adversely affect the title, or may look like problems but are not. See if you can catch them. But this is not a meaningless scavenger hunt, or a "Where's Waldo" exercise — I will pose questions after each scenario — and you can try to answer them on your own — but I have provided the answers that may in some cases surprise you. The questions immediately follow the fact patterns; the corresponding answers begin on page 15.

#1. "This Land is Your Land — or is it Mine?"

Harry owns Blackacre and Barry owns Whiteacre. They decide to sell their respective properties to Larry but in an effort to save money they decide to just give one deed, joining in it as grantors and describing their respective properties in the instrument. Harry and Barry both go to the closing and sign the deed in front of the notary. When the notary is about to take the acknowledgment of the deed he finds out that Harry has forgotten to bring his license. The notary looks at G.L.c. 183, §30 and notes that only one grantor has to acknowledge a deed, takes

Larry's acknowledgment only. The deed is accepted by the register of deeds and gets recorded.

Q1: Is the acknowledgement good?

Q2: If the acknowledgement is not good is it made good due to the fact that the register of deeds accepted it for recording?

#2. "I Promise, It's True!"

John sold his home to Mary and gave her a quitclaim deed. Later, Mary found out that when she purchased the property there was an attachment against John by the Acme Collection Company. She called John and demanded that he get a release of the attachment based on the covenants in his deed. He refused. Still later, Acme Collection Company won a judgment against John, got an execution from the court, recorded it and instructed the sheriff to sell the property at auction. When Mary found this out she called John again, threatening to sue him on his covenants. John said it was not his problem and hung up.

Q1: When Mary called John the first time did she have any rights against him?

Q2: When Mary called John the second time did she have any rights against him?

#3. "Anybody Seen Today's Paper?"

MERS held a mortgage on property owned by Amalgamated Properties, Inc. On May 1, 2007 the Dead Beat Mortgage Company began to run a mortgage foreclosure ad foreclosing the mortgage — the first three-week publication was on that day. The second publication was on May 8, 2007 and just before the third publication appeared in the paper on May 15, 2007 MERS gave an assignment to Dead Beat Mortgage Company dated May 4, 2007. At the auction on May 18, 2007 the Vice President of Dead Beat Mortgage Company made an entry and the auctioneer struck the title off to Bette Buyer, the high bidder. A week later Dead Beat Mortgage Company and Bette had a closing and the following documents, all in proper form, were recorded:

1. Foreclosure Deed
2. Foreclosure Affidavit
3. Entry
4. Appropriate Corporate Votes

On June 1, 2010 Bette deeded the property to Mary Jane.

Q1: Does Mary Jane have a good title?

#4. "I'll Be There Right Away"

John owns Blackacre. He's interested in acquiring a right of way (easement) over Whiteacre, a parcel owned by his neighbor, Mary. He talks with Mary and she's agreeable. The lawyers agree on a form of easement acceptable to everyone. The document is recorded with the intent of creating an easement that is an appurtenance to Blackacre and a servitude over Whiteacre.

John wants to sell Blackacre and the appurtenant easement it enjoys to your client. You explain to your client that you need to establish that (i) John has good title to Blackacre, (ii) Mary granted a good easement to John which is a valid appurtenance to his property and (iii) neither Blackacre nor the easement are subject to any defects of liens.

Q1: Do you need to order a municipal lien certificate on Mary's property?

Q2: After the easement is created is it necessary to keep running Mary as to Whiteacre to see if she has done anything to affect the easement?

#5. "Home Sweet Home"

John purchased property in his own name. John immediately recorded a homestead. When John showed up a few years thereafter at the bank attorney's office to refinance his home the bank lawyer required John, in addition to signing the new mortgage, to sign a separate release of homestead, which was recorded along with the new mortgage. The bank lawyer prepared a new homestead for John to sign, which was recorded immediately after the mortgage.

Q1: What mistake might the bank lawyer have made here?

Q2: Were any other mistakes made?

#6. "Time to Pay the Piper"

The year 2001 was not a good year for John. He found out that he made some disastrous calculations on his income tax return for 1999 and his spouse sued him for divorce and obtained a judgment for child support. Also, in the divorce proceedings an order was entered directing John to convey property that he owned to his spouse in lieu of alimony.

The IRS recorded a tax lien against John on July 1, 2002 for the taxes assessed as of December 31, 1999 and the probate court filed a child support lien against him on the very same day.

John's spouse wants to sell the property to your client today and this morning recorded a certified copy of the decree of the probate court directing John to make the conveyance to the spouse.

Q1: Does John's spouse have title to the property?

Q2: What liens affect the title to the property?

Checklist of 1031 Delayed Exchange Steps

– Mike Brady
Vice President and Eastern Region Manager,
Asset Preservation

This checklist is intended to provide a brief overview of the steps involved in an IRC §1031 tax deferred exchange.

Review: Review the entire transaction with tax and/or legal advisors.

Sale Contract: Enter into an "assignable" contract to sell the relinquished property.

Execute contract with the exchanger's name and/or assigns.

Contact a Qualified Intermediary: Before closing, contact a qualified intermediary to initiate the exchange transaction.

Exchange Set-Up: The qualified intermediary will prepare the exchange documents for the relinquished property sale.

A) The original documents will be forwarded to the closing officer who will coordinate the signatures.

B) Copies of documents are forwarded to the exchanger.

Relinquished Property Closes: The qualified intermediary is assigned into the transaction as the seller and sale closes.

A) Pursuant to the assignment agreement and exchange documents, the qualified intermediary instructs the closing officer to directly deed the relinquished property to the buyer.

B) Exchange proceeds are transferred directly to qualified intermediary via wire transfer.

Identification Period: Both the 45-day identification period and exchange period begin.

Although it is the sole responsibility of the exchanger to meet all identification rules, the qualified intermediary will forward confirmation of the exchange proceeds received, the timelines for the 45-day identification period and 180-day (or the date the tax return is due, whichever is earlier) exchange period, the identification requirements and the identification rules.

Property Identified: Exchanger properly identifies replacement property by midnight of the 45th day.

A) Specific written identification, signed by the taxpayer, is forwarded to the qualified intermediary.

B) Written identification can also be made to a party involved in the exchange transaction who is not a disqualified person. See the Treasury Regulations for more details on the identification requirements.

Purchase Contract: Enter into an "assignable" contract to purchase replacement property.

Execute contract with the exchanger's name and/or assigns.

Contact the Qualified Intermediary: After signing the replacement property contract, contact the Qualified Intermediary.

Exchange Paperwork Drawn: The Qualified Intermediary will prepare the exchange documents for purchase.

A) The original documents will be forwarded to the closing officer, who will coordinate the signatures.

B) Copies of documents are forwarded to the exchanger.

Replacement Property Closes: The Qualified Intermediary is assigned into the transaction and purchase closes.

A) Pursuant to the assignment agreement and exchange documents, the qualified intermediary instructs the closing officer to directly deed the replacement property from the seller.

B) The Qualified Intermediary wires transfers exchange proceeds to the closing officer.

Completion: If all exchange funds are used to acquire the replacement property or properties and all the exchange requirements are met, the exchange is complete.

Provided by Stewart's 1031 Exchange Subsidiary, Asset Preservation.

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Development is Difficult Enough with the Present State of the Economy

– Michael Agen, Esq.
Manager & Counsel-Springfield
and Rhode Island Agency Services Manager

It is no secret development is difficult enough in this economy. Add to that a municipal zoning scheme, sometimes antiquated, that prevents an economically viable use of a property coupled with the reluctance of a municipality to change zoning and you have a series of obstacles that cries for a creative solution. Municipalities are trying to find new ways of revitalizing dormant properties, thereby increasing their tax revenue, without negatively impacting the community as a whole. An examination of the evolution of the Doctrine of Contract Zoning may lead to a solution that is of economic benefit to the developer and municipality while withstanding judicial scrutiny.

Contract Zoning is the "process by which a local government enters into an agreement with a developer whereby the government extracts a performance or promise from the developer in exchange for its agreement to rezone the property." 3 Rathkopf, Zoning & Planning § 44:11 (Ziegler rev. ed.2001). The process is of course subject to attack since it may involve the contracting away (selling) of the police power to regulate zoning to a private individual with their own priorities which may or may not be in the best interest of the inhabitants of the city or town. That said, not all agreements are on their face void as the Massachusetts Appeals Court has stated "[t]he existence of an agreement per se does not invalidate related zoning actions; it is the nature of the agreement and the character of the zoning action that determine the outcome". *McLean Hospital Corp. v. Town of Belmont*, 56 Mass.App.Ct. 540, 778 N.E.2d 1016 (2002).

Since the decision in *Sylvania Elec. Prod., Inc. v. Newton*, 344 Mass. 428, 183 N.E.2d 118(1962) through *Durand v. IDC Bellingham, LLC*, 440 Mass. 45, 793 N.E.2d 359 (2003) the doctrine has evolved to allow for such agreements and to set a standard that would allow municipalities more latitude in dealing with developers without abrogating their duty and responsibility. *Sylvania* had raised the question whether a concession or consideration paid by a developer that was unrelated to the amelioration of the impact of the development may be extraneous consideration that would impeach the voting process and invalidate the zone change. This extraneous consideration test loomed over the approval of all zone changes that were conditioned upon concessions by a developer despite the fact that the zone change was on all other counts valid.

The test until *Durand* had three parts:

1) Was the zone change in the best interest of the municipality and thus not offensive to public policy?

2) Was extraneous consideration offered in a manner which would have impeached the voting process?

3) Did the action constitutes spot zoning? *Rando v. North Attleborough*, 44 Mass.App.Ct. 603, 692 N.E.2d 544(1998) *McLean Hospital Corp. v. Town of Belmont*, 56 Mass.App.Ct. 540, 778 N.E.2d 1016 (2002).

If any of these questions were answered in the affirmative then the zone change was not valid.

In *Durand* the town had formed a task force to determine how to increase its property tax base. That task force recommended that a certain parcel have its zoning designation changed to industrial. The parcel was adjacent to other industrial parcels, which negated the claim of Spot Zoning. (G.L.c. 40A, §4, mandates that all zoning requirements be "uniform." This mandate forecloses a municipality from engaging in spot zoning, which involves singling out an individual parcel for unique zoning treatment (*Rando v. North Attleborough*, 44 Mass.App.Ct. 603, 606, 692 N.E.2d 544 (1998).)

The zoning proposal went before the town meeting but did not receive the two-thirds majority necessary to pass. IDC, operator of a power plant, entered into negations with the town. The municipality was motivated to negotiate with IDC because it had an $8,000,000 shortfall in its construction budget for a new school. IDC publicly announced it would make an $8,000,000 gift to the town, to be used for any purpose, if 1) the zoning change was successful, 2) IDC decided to build a power plant on the parcel, 3) IDC built it and operated it successfully for one year. Town Departments and Boards recommended, and actively supported, the zone change which was passed. After the zone change there were continued negotiations that resulted in further restrictions imposed on the property by Special Permits.

The Court in describing Contract Zoning as Conditional Zoning set the tenor of its decision with the following quote:

> The municipal power of zoning is, however, no longer a matter of delegated State legislative power. The practice of conditioning otherwise valid zoning enactments on agreements reached between municipalities and landowners that include limitations on the use of their land or other forms of mitigation for the adverse impacts of its development is a commonly accepted tool of modern land use planning, see 4 A.H. Rathkopf & D.A.Rathkopf, Zoning and Planning s 44.12 (2001)

Durand set a new standard by recognizing the reality of development and the evolution of the process of land use planning. The decision looks to the validity of the zoning enactment based upon a "court examining a zoning arrangement should not affix a formalistic label to it, but rather should engage in the substantive inquiry that we undertake here, namely ascertaining whether the zoning action is consistent with state law and constitutional requirements, and otherwise meets the criteria for a valid exercise of police power."

This test was further followed and restated by the Appeals Court as to the question whether the provisions of the development covenant constitute extraneous consideration given to induce the vote of the 2000 town meeting adopting the map amendment. *Durand* renders that discussion largely inapposite; instead, we consider whether the map amendment "violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety, or general welfare." *Hanna v. Town of Framingham*, 60 Mass. App. Ct. 420 (2004).

Claims Avoidance or How to Keep Yourself Out of Trouble

– Sean F. O'Callaghan, Esq. and
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Claims Counsels

These past few years of skyrocketing foreclosures have coincided with unprecedented numbers of claim filings in the title insurance industry. Claims avoidance seems to be a popular topic of discussion, and as Claims Counsels we are often asked by our agents to describe some of the more common fact patterns that we see.

Below, we have set forth some different examples of common claim situations, discuss the issues raised by claimants or claimants' counsel on behalf of the Insured lenders and outline what you can do as a settlement agent to avoid these situations.

I. The Power of Attorney and Accompanying Attorney in Fact Affidavit

Scenario 1

Timmy and Tammy Smith are under contract for the sale of their Watertown home to Mike and Janet Johnson. Currently, Timmy and Tammy hold title to the property as tenants by the entirety. You are the settlement agent for ABC Bank. Two weeks prior to the closing date, Timmy informs you that he will not be able to attend the closing because of a prior work obligation. Rather than reschedule the closing date so Timmy can attend, you suggest that Timmy execute a Limited Power of Attorney authorizing Tammy to act as his attorney in fact and convey his interest in the Watertown home to the buyers at closing. You draft the power of attorney, Timmy properly executes the document and mails the document back to your office a week before the closing.

The closing occurs and Tammy executes a quitclaim deed of the property to Mike and Janet signing on behalf of herself and on behalf of Timmy as his attorney in fact. You record the Power of Attorney, the deed, the MLC and Mike and Janet Johnson's mortgage to ABC Bank. Everyone can go home happy, correct?

Probably not. How do you and subsequent purchasers know that the power of attorney was still in effect at the time of the transaction in question? What if the night before the closing, Timmy changed his mind and decided not to sell the property and revoked the power of attorney he had granted to his wife?

For assistance with this question, let's take a look at the Article V, Part 5 of G.L.c. 190B entitled, "Massachusetts Uniform Probate Code."

> Section 5-504: Power of Attorney Not Revoked Until Notice.
>
> (a) The death of a principal who has executed a written power of attorney, durable or otherwise, shall not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.
>
> (b) The disability or incapacity of a principal who has previously executed a written power of attorney that is not a durable power shall not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the disability or incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his successors in interest.

For the purposes of our discussion, let's assume that the power of attorney in question does not contain some type of self-proving provision which specifically allows good faith purchasers to rely on the power of attorney being in full force and effect until documentation which indicates a contrary intent is recorded at the Registry of Deeds.

How do we establish that the attorney in fact acted in good faith and without knowledge of the death, disability or incapacity of the principal so that a third party can safely rely on his/her actions?

The answer to that question is discussed in Section 5-505 which states the following:

Section 5-505: Proof of Continuance of Durable and Other Powers of Attorney by Affidavit.

> As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death, disability, or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable. This section shall not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

The attorney in fact should sign an affidavit, under the pains and penalties of perjury, which states that at the time he/she exercised the power in question, he/she had no knowledge of the revocation of the power by the principal or the death, disability or incapacity of the principal. Such an affidavit must be recorded so that third parties, such as purchasers and mortgagees, may reasonably rely on such evidence that the attorney in fact's authority had not been revoked or terminated.

REBA Title Standard 34 also discusses this topic and requires the following:

1. An instrument executed after September 19, 1981, by an agent under a recorded, durable power of attorney containing a power to convey is not on that account defective during any period of disability or incapacity of the principal provided:

   (a) the power of attorney had not, at the time of such execution, terminated pursuant to its own terms; and

   (b) there has been recorded an affidavit signed by the attorney in fact or agent under the penalties of perjury stating that the attorney in fact or agent did not have at the time of such execution pursuant to the power of attorney, actual knowledge of the revocation or of the termination of the power of attorney by death.

2. An instrument executed after December 31, 1977, by an agent under a recorded power of attorney containing a power to convey is not on that account defective provided:

   (a) the power of attorney had not, at the time of such execution, terminated pursuant to its own terms; and

   (b) there has been recorded an affidavit signed by the attorney in fact or agent under the penalties of perjury stating that the attorney in fact or agent did not have at the time of such execution pursuant to the power of attorney, actual knowledge of the revocation or of the termination of the power of attorney by death, mental illness or other disability.

How can you avoid this type of claim situation?

Whenever you are acting as a settlement agent and the deed or mortgage is being executed under a power of attorney, remember that the attorney in fact must execute an accompanying affidavit which indicates that he/she has no knowledge of the revocation or termination of the power at the time of the transaction. Along with the power of attorney, the affidavit must be recorded at the Registry of Deeds. Third parties can then rely on this documentation as evidence of the attorney in facts authority to act.

Scenario 2

Timmy and Tammy Smith still own their Watertown home. They want to refinance with MNO Bank, but for whatever reason the lender does not want Timmy listed as borrower on the mortgage. You are the settlement agent for this transaction. Timmy is out of state on business, but Tammy provides you with an original Durable Power of Attorney that Timmy executed the prior year in connection with some estate planning the husband and wife had done. You review the power of attorney and find that it grants to the attorney in fact the power to sell as well as the power to mortgage the property. You draft a deed wherein the property is conveyed to Tammy individually for nominal consideration. Tammy signs the deed for both herself and for her husband as attorney in fact. Tammy executes an attorney in fact affidavit which confirms that the power has not been revoked or terminated. Tammy then executes the mortgage to MNO Bank. As settlement agent, you record the power of attorney, the attorney in fact affidavit and the mortgage. Everything should be fine, correct?

Probably not. Remember a conveyance for nominal consideration does not constitute a sale of the property. Also, you must confirm that the power of attorney allows for this type of self-dealing by the attorney in fact. Many durable powers of attorney place limits on the amount of the gift(s) the attorney in fact can transfer to himself or herself on behalf of the principal.

How can you avoid this type of claim situation?

You must carefully review the terms of the power of attorney in question to confirm that there is a specific provision which allows for this type of self-dealing by the attorney in fact. If you have any questions regarding whether or not the power of attorney you are dealing with has this type of clause, do not hesitate to contact your Stewart Underwriters.

II. Paying off and Properly Discharging a Senior Home Equity Line of Credit

Scenario

Jerry and Elaine own a Massachusetts home and plan to refinance their current purchase money mortgage with BANK Lender. As the settlement agent for the refinance, you contact your title examiner who reports that in addition to Jerry and Elaine's current purchase money mortgage that is in senior lien position, Jerry and Elaine also have a secured Home Equity Line of Credit ("HELOC") as a junior lien.

At the closing, you have obtained the most up-to-date payoff information pertaining to the purchase money mortgage and HELOC. In addition, you have collected enough money to pay off both liens. Upon execution of the refinance mortgage and the three day right of recession lapses, you inform your title examiner to record the refinance mortgage and you proceed to pay off the purchase money mortgage and HELOC. As the settlement agent, there is nothing left to do but wait for the two discharges to be put on record, correct?

No, as you know, Home Equity Lines of Credit are different from purchase money and most refinance mortgages. Purchase money and most refinance mortgages are actually one-time financial transactions whereby the Lender loans an agreed-upon amount in exchange for a promise to pay the amount back in monthly installments. This loan is secured by the particular property owned by borrower (i.e. the mortgage). HELOCs are credit accounts that, while secured by the particular property owned by the borrower, can be drawn upon or paid down by the borrower on numerous occasions.

The issue with paying off a HELOC at a sale or refinance transaction is that, sometimes, the Lender fails to close out the borrower's account and the borrower subsequently draws more money on the account. Thus, there will remain a senior lien to your lender's mortgage unless the borrower subsequently closes the account, which rarely occurs.

Failure to properly close and record a discharge of a HELOC can cause significant problems for both the subsequent owner in a purchase transaction, and the lender. In a purchase transaction, should the seller withdraw money on a HELOC which is allowed to remain open, the current owner of the property could be subject to a possible foreclosure action by the HELOC mortgagee should the seller subsequently default. Lenders in a purchase or refinance transaction have similar exposure should the prior HELOC not be properly paid off, closed and discharged of record.

Obviously, this type of situation can result in a significant claim. How can you avoid this type of situation?

As a settlement agent, any time a Home Equity Line of Credit is to be paid off at closing, a Termination of Credit Account or Close-Out Account letter must accompany the payoff with specific instructions from the borrower to close out the account and discharge the secured Home Equity Line of Credit. Upon submitting the appropriate close-out letter from the borrower, your office should actively seek a discharge of the Home Equity Line of Credit to ensure that the lien is properly released and you avoid a possible claim. Continue to pursue the discharge in question until the discharge has been obtained and recorded with the Registry of Deeds.

III. Estate Tax Liens

Scenario

Manny and Fanny own the Real Property located 456 Main Street in Malden as joint tenants as of 2001. Unfortunately, Manny dies in 2006. In 2008, Fanny attempts to refinance the Property. You are the settlement agent for this transaction. Your title examiner reports to you that Fanny is the record title holder of the property, per a recorded copy of Manny's death certificate at the local Registry of Deeds. Therefore, you proceed with the refinance transaction. Fanny falls upon difficult financial times late in 2009 and cannot pay her mortgage. The lender attempts to foreclose and through their title examiner discovers that although there is no issue with the record chain of title, there may be a senior lien to their mortgage as there is no Massachusetts Estate Tax release of record pursuant to G.L.c 65C, §14(a).

As you may know, estate taxes are a transfer tax on the value of the decedent's estate before distribution to any beneficiary. Thus, in our above example, upon Manny's death, the estate taxes may apply and attach to the property. Upon the death of a person, a legal claim by the Commonwealth automatically arises on all property taxable in the Massachusetts estate on the date of death.

Therefore, it is important to know when such a tax applies and when such a tax is adequately released. To help us understand when these taxes apply and how they are released, it is helpful to discuss REBA Title Standard Number 24, which states in part:

> B. For Deaths between January 1, 1997 and December 31, 2002
>
> There is no Massachusetts estate tax lien if the sum of the (a) decedent's federal taxable estate and (b) adjusted taxable gifts was less than the amounts set forth below:

Year of Death	**Net Estate**
1997	$600,000
1998	$625,000
1999	$650,000
2000, 2001	$675,000
2002	$1,000,000

Land is free of the Massachusetts estate tax lien 10 years after the date of death and sooner:

1. When there is proof of payment of the amount shown due by the Massachusetts estate tax closing letter provided (a) the land is reported in the probate inventory filed in the decedent's estate; or (b) in the case of the non-probate property, there is properly documented evidence that the property was listed in the estate tax return; or
2. When the Commissioner of Revenue issues a certificate of release or partial discharge of the lien; or
3. Upon the recording of an affidavit stating that the decedent's estate does not necessitate the filing of a federal Estate Tax return.

C. For deaths on and after January 1, 2003

There is no Massachusetts estate tax lien if the sum of the (a) decedent's federal taxable estate and (b) adjusted taxable gifts was less than the amounts set forth below:

Year of Death	**Net Estate**
2003	$700,000
2004	$855,000
2005	$950,000
2006 and after	$1,000,000

Land is free of the Massachusetts estate tax lien 10 years after the date of death and sooner:

1. When there is proof of payment of the amount shown due by the Massachusetts estate tax closing letter provided (a) the land is reported in the probate inventory filed in the decedent's estate; or (b) in the case of the non-probate property, there is properly documented evidence that the property was listed in the estate tax return; or
2. When the Commissioner of Revenue issues a certificate of release or partial discharge of the lien; or
3. Upon the recording of an affidavit stating that the decedent's estate does not necessitate the filing of a Massachusetts Estate Tax return based upon the amounts set forth in the table above.

As such, for deaths on or after January 1, 2003, it is important to note that the Massachusetts estate tax has been decoupled from the Federal Estate Tax and is instead tied to the provision of the Internal Revenue Code effective as of December 31, 2000. Therefore, the threshold amounts for filing Massachusetts and federal estate tax returns will be different.

Therefore, it is important to remember that when dealing with a situation where the owner died on or after January 1, 2003, both the Massachusetts Estate Tax lien and the Federal Estate Tax lien should be addressed in connection with your transaction.

How can you avoid this type of claim situation?

If you as a settlement agent record an estate tax affidavit for a person who died on or after January 1, 2003, the affidavit must declare that the decedent's estate does not necessitate the filing of a Massachusetts *and* federal estate tax return, if applicable. If the size of the decedent's gross estate does require the filing of either or both estate tax returns, then estate tax releases must be obtained and recorded.

If you ever have a question about whether such an affidavit or release is needed, do not hesitate to contact a Stewart Underwriter.

IV. Tenancy Matters – Possible Missing Interest Problems and the Importance of Checking Probate and Administration Records

Martha and George acquired title to their property in Tewksbury as tenants by the entirety in 2000.

Scenario 1

Sadly, George dies of old age in 2005. Unable to maintain the property without help, Martha contracts to sell the property. You are the settlement agent for the purchaser's lender. Upon completion of the title exam, your examiner informs you that the property is owned by Martha and George, as tenants by the entirety. When you contact Martha to find out George did not sign the purchase and sale agreement, she informs you of the sad news pertaining to her husband's death. After you extend your appropriate condolences, you remember that, in Massachusetts, upon the death of one tenant by the entirety, the deceased's interest in the property owned transfers to the surviving spouse. Without any further inquiry, you proceed with the sale accordingly and Martha conveys the property to Ben and Jerry. Ben and Jerry execute a purchase money mortgage to your client, the lender, and you record the deed and the mortgage with the Registry of Deeds. Subsequently, Ben and Jerry run upon hard times and cannot pay their mortgage. Accordingly, their lender attempts to foreclose upon their mortgage and their title exam reveals that there is a possible missing interest problem because there is a gap in the record chain of title (i.e. there is a deed into Martha and George, but the deed out is only from Martha). Thus, the purchase money mortgage that your office conducted may not properly encumber the entire, if any, interest of the property as the Lender and Parties intended, if George is not, in fact, deceased.

How can the settlement agent avoid this type of claim?

In this scenario, the settlement agent needs to make sure there is record evidence that George's interest in the property either vests with, or was deeded to Martha, prior to Martha conveying the property to Ben and Jerry.

For assistance with this issue, a review of REBA Title Standard No. 71 is appropriate. In part, the title standard states that evidence of death of a deceased joint owner or life tenant can be established by the recording of a death certificate at the Registry of Deeds in the district where the property is located or if a death certificate is located in the docket or a probate or other proceeding in the Probate Court in the County where the real property is located. In addition, the recording of the following documents at the appropriate Registry of Deeds is sufficient as proof of death:

1. A certified copy of an allowed petition for probate or administration of the decedent's estate, or a certificate of appointment in such matter, which in either case recites the decedent's date of death, provided that recording of such petition in the Registry of Deeds shall not be necessary if such petition is filed in the same county where there property is located; or

2. A Massachusetts Inheritance Tax Lien Release relative to the decedent's interest in the property; or

3. A Massachusetts Certificate of Release of Estate Tax Lien relative to the decedent's interest in the property, provided the document has been recorded for twenty (20) years; or

4. A deed for the real property from the survivors that contains a recital that the decedent has died, even if no date or place of death is recited, provided however, that such deed has been recorded for more than twenty (20) years.

When faced with a situation whereby one tenant, in a tenancy by the entirety, is attempting to convey the entire property, the first thing the settlement agent should do is have their examiner check the appropriate Registry of Deeds for the other tenant's Death Certificate. In our above scenario, if a copy of George's death certificate is already recorded, then record title should vest the entire Property in Martha. Thus, Martha would be able to validly convey the entire interest in the property to Ben and Jerry.

If a death certificate is not already on record, and one cannot be easily obtained and recorded at closing along with the deed/mortgage, the settlement agent should have their examiner check the appropriate Massachusetts Probate Court records. Probate documents, after final disposition, are matters of public record. Your examiner should be able to look for the Probate or Administration of the purportedly deceased tenant's estate. If the deceased's Probate or Administration contains a certified copy of a Death Certificate, or the allowed Petition for probating the estate as discussed above (#1), that document should provide the appropriate record evidence that the surviving tenant owns the complete interest in the property. In our scenario, if the settlement agent's title examiner found George's probate from 2005 at the appropriate Probate Court and the file contained a death certificate, Martha would be the record title holder of the Property. Thus, Martha could validly convey the Property individually. Should the probate documents not contain any acceptable evidence of death of a record title holder's death, your examiner should continue to look for a recorded Inheritance Tax Release or a Certificate of Release of Estate Tax Lien.

As a helpful reminder, the settlement agent should maintain a copy of the evidence of death or probate records in their file and request that any recorded conveyance documents (deed/mortgage) reference the probate docket number or the recording information of the evidence of death to reduce confusion for future transactions.

Should you not be able to find documentation of a record title holder's death pursuant to any of the acceptable forms of evidence referenced in Title Standard No. 71, you should not proceed with the transaction until you have reviewed this matter with a Stewart Underwriter.

Remember in a tenancy by the entirety if a divorce has intervened, the tenancy will be converted to a tenancy in common.

Scenario 2

Martha is in the process of refinancing the mortgage on the Property. You are conducting the closing as settlement agent. Upon completion of a title exam, your examiner informs you the current owner deed reveals that the property is in the name of Martha and George as tenants by the entirety. Martha informs you that George died several years ago. After you extend your appropriate condolences, you remember that in Massachusetts, upon the death of one tenant by the entirety, the deceased's interest in the property owned transfers to the surviving spouse. Without any further confirmation, you proceed with the refinance and execute the refinance mortgage. However, George is in fact alive and well. George and Martha are in the process of a very turbulent marriage and Martha plans on taking the proceeds from the refinance for the purposes of enjoying a lavish European vacation. If this sounds far fetched or ridiculous, please keep in mind that we have seen a similar claim in the past.

As previously discussed in Scenario 1, one tenant of a tenancy by the entirety cannot convey property without the consent of the other tenant. See *Hale v. Hale,* 332 Mass. 329, 331 (1955). Thus, situations like the one stated in

Scenario 2 are a nightmare because the refinance mortgage that your office conducted may not properly encumber the entire, if any, interest of the property as the Lender intended due to the fact that George did not sign the mortgage. Should the mortgagee attempt to subsequently foreclose due to the borrower's default, the mortgagee may encounter significant difficulty enforcing their rights because George may challenge the validity of mortgage because he did not sign the document.

Therefore, whenever you are faced with one record title holder attempting to convey the entire property prior to closing, have your examiner check the Registry of Deeds and probate records for any of the evidences of death of a purportedly deceased joint owner/life tenant pursuant to Title Standard No. 71. By checking the Registry of Deeds and probate records, you can avoid a possible claim and make sure the borrower can properly convey the real property that they purportedly own. If you ever have any questions, please do not hesitate to contact our Stewart Underwriters.

V. Acknowledgment of Deeds

Scenario

David and Donna Dawkins are selling their Arlington, Massachusetts property. You are handling the sales transaction for QRS Bank, the lender for the buyers. David and Donna have granted executed powers of attorney in favor of their attorney, John Smith, Esq., as Mr. and Mrs. Dawkins are in Florida and will not be attending the closing. Attorney Smith has forwarded to your attention copies of these powers of attorney as well as a proposed deed for your review. The closing date arrives and the buyers and Attorney Smith are at your closing table. Attorney Smith executes the sellers' documents and signs an affidavit indicating that the power has not been terminated or revoked. He then provides you with the deed that has been signed by both sellers. However, as you review the final deed you notice that only one of the signatures has been acknowledged. You mention this discovery to Attorney Smith who tells you that Mrs. Dawkins has been ill and could not leave her home to appear before a notary public. Attorney Smith suggests that you contact Mrs. Dawkins to confirm that she has executed the deed and provides you with her telephone number. He also states that under G.L.c. 183, §30, only one of the grantors' signatures needs to be notarized for the deed to be effective. You use the telephone number supplied by Attorney Smith and speak with Mrs. Dawkins. You review the statute and find that it states the following:

> Chapter 183: Section 30. Method of making acknowledgment
>
> Section 30. The acknowledgment of a deed or other written instrument required to be acknowledged shall be by one or more of the grantors or by the attorney executing it. The officer before whom the acknowledgment is made shall endorse upon or annex to the instrument a certificate thereof. Such acknowledgment may be made—
>
> (a) If within the commonwealth, before a justice of the peace or notary public.
>
> (b) If without the commonwealth, in any state, territory, district or dependency of the United States, before a justice of the peace, notary public, magistrate or commissioner appointed therefor by the governor of this commonwealth, or, if a certificate of authority in the form prescribed by section thirty-three is attached thereto, before any other officer therein authorized to take acknowledgments of deeds.
>
> (c) If without the United States or any dependency thereof, before a justice of the peace, notary, magistrate or commissioner as above provided, or before an ambassador, minister, consul, vice consul, charge d'affaires or consular officer or agent of the United States accredited to the country where the acknowledgment is made; if made before an ambassador or other official of the United States, it shall be certified by him under his seal of office.
>
> Given the language of the statute and the anxious buyers you have sitting at your closing table, you go forward. You record the deed and mortgage and the buyers move into their new home. Some time later you are contacted by an attorney for the buyers who tells you that Donna Dawkins has filed suit against the buyers and the lender. She alleges that her signature on the deed to the buyers was forged. At this point you review the deed once again and recall the conversation you had with Attorney Smith the day of the closing and see that only David Dawkins' signature on the deed was acknowledged. You call Donna Dawkins' attorney to find out the particulars of her complaint. He informs you that he has a handwriting expert who will testify that the signature on the deed to the buyers was not his client's. You mention that the buyers were innocent purchasers, but he tells you that the bona fide purchaser defense will not be successful when dealing with the issue of forgery.

How can you avoid this type of claim situation?

As you can imagine, this type of claim can have serious ramifications for everyone involved. Unfortunately, depending on the extent of the nefariousness of the parties, in the example above, Mr. Dawkins and his attorney, you may not always be able to avoid situations involving alleged forged instruments.

In the fact pattern above, depending on the powers granted in the power of attorney, the attorney in fact could have also executed the deed on behalf of his principal in your presence. Of course, given the apparent character of Mr. Dawkins and the seller's attorney in our claim hypothetical, the power of attorney from Donna Dawkins to Attorney Smith may have also been forged.

Whenever you are dealing with an out-of-the-ordinary situation like the one we have outlined above, pay attention for "red flags"; for example the deed that was purportedly signed by both parties but only one grantor's signature was acknowledged. Do not hesitate to contact a Stewart Underwriter to review your particular fact pattern and discuss how you might be able to protect your client, the company and your firm.

Refresher for Reviewing Foreclosures

– Jane L. Greenhood
Underwriting Counsel

I am offering this article as a refresher for issues to spot when reviewing a foreclosure. The same rules and standards apply whether the foreclosure took place in your back title or is the immediate source of title to the current buyer.

Start by comparing the deed into the borrower against the mortgage being foreclosed.

Identity of the Mortgagor

- Are the grantees and mortgagors the same? Too often we see one spouse being dropped from the mortgage because of their bad credit rating; good, bad, or indifferent; all owners must be accounted for as mortgagors.
- Are your mortgagors subject to some restraints to act freely, such as being a ward under a guardianship requiring a license to mortgage, or under protection of a bankruptcy petition requiring permission of the court to grant a mortgage? Make sure your examiner has checked probate and bankruptcy indexes.

In the event the borrower(s) was not an individual, is the signatory duly authorized?

- Trust: Is the Declaration of Trust or a 184/35 Trustee's Certificate recorded with or prior to the mortgage?
- LLC: Can you verify on record or on line that the LLC was in existence at time of granting mortgage and corroborate the identity of the manager or other signatory who executed the mortgage?
- Corporation: Check to see mortgage was signed by President or Vice President and Treasurer or Assistant Treasurer, otherwise was a vote recorded therewith?
- Limited Partnership: Can you verify on record or on line that the party signing was its General Partner?
- General Partnership: Is there compliance with REBA Standard 44?
- Power of Attorney: Is the POA previously or contemporaneously recorded with the mortgage? Is there an affidavit of no knowledge of revocation, death, or disability or incapacity recorded therewith? Does the POA authorize the attorney in fact to sign mortgages? Was the proper format followed: Mortgagor identified as Principal, signature "Principal's Name, by so and so, her Attorney in Fact"?

Description Checklist

- Does the deed's property description agree with the mortgage description?
- If there is an Exhibit, was it actually attached?

Necessary Powers Contained in the Mortgage

- Does the mortgage contain a reference to Statutory Conditions and Statutory Power of Sale?

Homestead Considerations

- If the mortgage in question was a refinance and the borrower is an individual who previously recorded a homestead, double check to see if the deed into borrower identified him/her as being unmarried. If not, failure to have a non-title holding spouse join in signing mortgage in order to subordinate the homestead will result in un-extinguished rights of the family to possess the premises.

The Assignment

- Is the assignor the same as the original mortgagee?

  Example: Mortgagee is MERS as Nominee for Bank of Massachusetts and Assignment is from MERS not Bank of Massachusetts.

  Example: Mortgagee is A and Assignment recites "B, successor by merger to A."

  Example: Mortgagee is A and Assignment from A by its Attorney in Fact with a reference to the Power of Attorney in the signature block or recorded immediately therewith.

- Do the Mortgagor's name, date of mortgage and recording book and page of mortgage all agree? The so-called two out of three rule may resolve an incorrect reference so long as the Book and Page reference does not refer to another mortgage from the same borrower to same lender, rendering the instrument be too ambiguous.

Out-of-Order and Post-Dated Assignments

- The companion cases of Ibanez, Larace and Rosario involved three variations on the same theme of foreclosures by assignees whose assignments were not dated and recorded at the time of the first publication date of the mortgagee's notice to sell pursuant to G.L.c. 244 §14.

  Ibanez's mortgagee/assignee did not acquire an interest in the mortgage until long after the foreclosure sale by an assignment dated post sale.

  Larace's mortgagee/assignee did not acquire an interest in the mortgage until after the foreclosure sale ***by an assignment dated effective as of or prior to the foreclosure sale but the actual date (based on date of notarization) was post sale***.

  Rosario's mortgagee/assignee was the actual holder of the mortgage prior to the first publication date but failed to record its assignment until a year after the sale.

  The only foreclosure that was held to be valid was Rosario's.

- Practical effect of the holding:

  The lender who publishes the three consecutive week notices in a newspaper with circulation in the town where the land lies, pursuant to G.L.c. 244 §14 must be the actual holder of the mortgage by an assignment dated prior to the first publication date.

  In order to determine if foreclosure is in compliance with this ruling check the actual date (not effective date) of the assignment(s) and make sure it is dated no later than one day prior to the first publication date as recited in the foreclosure affidavit.

- What can be done to correct a foreclosure that violates the holding in Ibanez?

  If the bank was the original highest bidder, the bank could re-foreclose as there is no third party buyer who may be ousted by a new highest bidder;

  or

  Record a release deed from the mortgagor to the third party buyer. Caveat: Other than the borrower's reluctance to aid the foreclosing lender, any subordinate liens that would have otherwise been wiped out by the foreclosure will remain valid and will require releases or discharges.

  The conveyancing bar awaits further ruling on this issue, and until that time if your title is dependent on a "Ibanez style" foreclosure in which re-foreclosure or release deed are not an option, inquire if there is a current title insurer who would be willing to indemnify the proposed new insurer.

Servicemembers Civil Relief Act (SCRA)

If the borrowers qualify for protection because they are natural persons, not a business entity (other than a nominee trust) the foreclosing lender is required to prove to the satisfaction of the court (Land Court or Superior Court) that the borrowers are not protected by the Relief Act.

Recent case law in the Bankruptcy court **may** render the foreclosure void if:

> The borrower files for bankruptcy protection and the lender petitioning bankruptcy court for removal from the automatic stay in order to foreclose is not the holder of record at the time of filing the complaint. (*In Re Schwartz*) Bear in mind, unless the fact pattern involves a borrower in bankruptcy at the time the lender brings the complaint under SCRA, under current case law, the fact that the lender is not yet the holder of the mortgage by assignment until after the complaint is filed is not, on that account, fatal.

Judgment under the SCRA action must issue before the foreclosure sale date. Should judgment enter on the date of the sale or later an action to remove a cloud from title will be necessary.

The main focus of your review of the Complaint and Judgment is to verify that the owner(s) of the equity of redemption (the borrowers or whoever bought the property subject to the mortgage) is/are properly identified.

A post judgment assignment of the mortgage will not invalidate the SCRA decree; just be certain that whoever was the holder of the mortgage received the same by an assignment dated before the first publication in compliance with the Ibanez holding.

The Entry

- The Entry or Evidence of Possession is a separate means of foreclosing independent of the lender's exercise of its statutory rights under its conditions and power of sale. The act of the Entry is symbolic to show the world that the lender entered upon the property and asserted ownership rights. Three years thereafter the entry "ripens" and the bank becomes the owner and any procedural errors in the foreclosure deed, affidavit, notice and publication are no longer of concern as this "belts and suspenders" measure cures any defects with the foreclosure process.
- There must be two witnesses to the entry, and the entry itself must be made by the lender through one of the bank's officers or by the lender's agent by way of a power of attorney. The notary clause in the Entry should contain the language "under other," and the notary must be a third party.

- Verify that whoever is making the Entry is duly authorized.
- If the person giving oath is doing so pursuant to a Power of Attorney make certain to review the POA. If there is none recorded therewith, it may have been previously recorded, but typically examiners are not going to hunt for it. Therefore, it is recommended that an Attorneys' 183/5b Affidavit be recorded in order to identify the book and page of the authority document(s).
- Powers of attorneys granted for making Entry and for signing the foreclosure deed may be signed by any of the principal's officers. In all other contexts, the power of attorney must be signed by a duly authorized officer with the benefit of a vote or resolution.
- Often the attorney in fact will delegate his or her authority to a third party to make Entry. This delegation of authority must be recorded with or referred to in the Entry. If the POA is not recorded simultaneously, a 183/5(b) affidavit will help to incorporate by reference the recording information for the authority document.
- This delegation in an Entry context is authorized even if the Power of Attorney does not contain the power to delegate. In all other contexts, if an attorney in fact attempts to delegate, there must be a specific provision authorizing the agent to delegate. The authority documents should be recorded with the Power of Attorney, or referenced by book and page in the signature block. Otherwise, the 183/5(b) affidavit should be employed to connect the documents.
- If relying on the ripening of an Entry as the sole means of foreclosing you will still require compliance with SCRA during the ripening period or if after the fact, by way of a Petition to Remove Cloud on Title in the Land Court.

The Foreclosure Deed

When reviewing a foreclosure deed break it down to its elementary parts:

- Grantor: Is the entity the current holder of the mortgage because:
  1. It was the original mortgagee;
  2. It was properly and timely assigned;
  3. It is the successor by merger; or
  4. Is there a missing element?
- Is the original mortgage reference information correct; mortgagor, date, book and page?
- Is the amount of the consideration the same as the bid amount as recited in the Affidavit of Sale?
- Signature Clause: Is it pursuant to a Power of Attorney? Is the power referenced in the signature block or recorded therewith, or will a 5(b) affidavit be necessary in order to reference the recording information for a previously recorded POA?
- Power of Attorney: Is it granted by the principal (mortgagee) or is it a granted by a delegatee of the primary attorney in fact, to which reference is made with a book and page, recorded therewith or with the benefit of a 5(b) affidavit?
- Does the Power of Attorney include the power to sign foreclosure deeds?
- Does the Power of Attorney include the power to delegate?
- How does one entity sign on behalf of another?
- If the bank is signing, is its president and treasurer executing the same (or variation on that theme) or is there a vote on record to which reference is made?
- If the agent is signing on behalf of the principal the format should be as follows:

  Principal
  By its attorney in fact
  By_______________

Affidavit of Sale

The affiant certifies that all the requirements under G.L.c. 244 §14 were met, but it is up to you to verify the veracity of their statements:

- Were the three publication dates for three consecutive weeks?
- Is the first publication date at least 21 days prior to the scheduled sale?
- If the sale was postponed, was the announcement of same by public proclamation at the first scheduled date, time and place? Was an additional title rundown made by the foreclosing lender to make certain notice to any additional parties who may have acquired an interest in the property prior to 30 days before the rescheduled sale date?
- Was the sale held at the time and place as advertised?
- Is there a recitation that the lender has complied with c. 244, §14 by mailing the notices certified mail return receipt requested (the green cards)?
- If the grantee is not the highest bidder, was there an Assignment of Bid recorded therewith?
- Is there a recitation that the auctioneer was licensed?

- If the foreclosure is within the past three years (a therefore the Entry has not yet ripened) have you reviewed the Green Cards to make sure everyone whose interest is being wiped out by the foreclosure (whose interest was created up to 30 prior to the sale date) was given notice? The latest the notice may be sent is 14 days prior to the sale.

  Caveat: subordinate lenders may have assigned their mortgage or the entity may have merged or morphed into a new entity or a conservator or receiver, be sure that the correct entity received notice.

  Owners of the equity of redemption may have died, and if a probate was opened, the parties named therein must receive notice, as well as any creditors, if any, who filed claims against the estate along with the Department of Revenue and the U.S. Treasury.

  Owners may also be deemed incompetent and a guardian or conservator appointed in which case notice must go to their legal representative.

  Owners may also file bankruptcy. In case of Bankruptcy, the lender must seek removal of the automatic stay in order to proceed.

  If an IRS lien was recorded post mortgage, special notice must be given to it no later than 25 days prior to the sale date. Language must also be included in the affidavit to that effect.

  There is a 120 day period after the sale date for the IRS to exercise its right of redemption, and the purchaser at foreclosure takes subject to same.

  If a horticultural or agricultural tax lien providing a reduced tax rate is recorded at anytime in your chain of title and has not expired or been waived and released, additional notice to the town must be given 90 days prior to the scheduled sale date.

  If the property in question is a condominium unit, was notice given to the governing body Association or Trust?

Property Description

- Is the property description (copy of the newspaper advertisement) identical to the mortgage description? This is critical in order to ascertain that potential bidders had the exact information for what they thought was for sale. If the wrong street address was given and the erroneous address was a dilapidated hunk 'o' junk, one could argue that the sale was "chilled" since potential bidders would be discouraged from bidding and the auction bidders were far less vigorous, resulting in a less than fair market value sale price which may force the borrower into bankruptcy, and if sued by the bank for the deficiency owed under the note (creditors' rights) the foreclosure sale could be voided.
- Was the original mortgage for several condominium units or lots in a subdivision for which several partial releases were granted prior to the sale? If so, and the remaining security under the mortgage was one unit or lot vs. several yet the advertisement failed to recite "less units… or lot…", many potential buyers could be discouraged from bidding as they perceived the value of the properties (vs. one unit or lot) greater than what they would bid…. another way of "chilling the sale."

Cures after the Fact

- Due execution authority documents not on record at the time of the signing of the document in question? Recording a vote or power of attorney after the fact with ratifying language may cure the defect.
- Missing Assignments? So long as the actual date of the assignment was prior to the first publication date, not "effective date" it can be recorded after the fact to cure this missing link.
- Failure to notify a party in interest pursuant to c. 244 §14? Obtain and record a waiver.

Conclusion

There is no one size fits all checklist for reviewing a foreclosure. Your best approach is to set aside some uninterrupted time to review the deed, mortgage, and then everything that was recorded thereafter, make notes akin to a roadmap, and once the "journey" has ended with the act of foreclosing or and REO deed, make notes as to what issues may exist.

The underwriters at Stewart are happy to review any issues and are available to review and resolve the same, or better yet, hopefully dispel the notion that an issue in fact exists.

Answers — Did You Catch That?

#1. "This Land is Your Land – or is it Mine?"

Q1: Is the acknowledgement good?

A1: It's true that the statute requires only one grantor to acknowledge the deed. Note, however, that in this case each grantor owns a different parcel and that only the owner of Whiteacre (Barry) gave the acknowledgment. Putting aside questions of forgery or impersonation (take it for granted that Harry is who he claims to be) the sole purpose of an acknowledgement is to entitle the instrument to be recorded, which thereby provides constructive notice to the world. So, the only question is whether the acknowledgment was good where the owner of one of the parcels (Harry) did not participate in the acknowledgement.

The answer is found in *Shaw v. Poor* 23 Mass. 86, 6 Pick. 86 (1827), where the facts are just as they are here and the court said, "The [constructive] notice [that acknowledgment provides] is the same, whether [the grantors] are seised as tenant in common of the whole land conveyed, or are separately seised of distinct parcels."

Q2: If the acknowledgement is not good is it made good due to the fact that the register of deeds accepted it for recording?

A2: As noted, the acknowledgement here is good, so Question 2 is moot, but let's answer it anyway. If an instrument is defectively acknowledge its recording is a nullity. Although it binds the parties themselves, their heirs and devisees and persons having actual notice of it, it will not bind the world at large. *Pidge v. Tyler*, 4 Mass. 541 (1808). This is crucial where, for example, an attachment is recorded against the grantor, as attaching creditors are unlikely to look for and therefore see and find the deed. Worse yet is where the grantor goes into bankruptcy: the trustee in bankruptcy is a "hypothetical bona fide purchaser," so even if the trustee knows about or sees the deed he will not be bound by it if improperly acknowledged (and therefore defectively recorded).

After ten years a defective acknowledgment or no acknowledgment at all does not pose a problem. See G.L.c. 184, §24.

#2. "I Promise, It's True!"

Q1: When Mary called John the first time did she have any rights against him?

A1: This question has a very interesting answer but the next answer will even be more so. A quitclaim deed contains Quitclaim Covenants, also known under the statute as "Limited Covenants" (I've seen it only once in a deed), which is really two separate covenants. One of those covenants — the one we're discussing now — is that the grantor covenants that the "granted premises are free from all encumbrances made by the grantor." This is the "modern" (post-1913) version of the covenant. Before then, this covenant by the grantor was that the premises are free of all encumbrances "made or suffered" by the grantor. The significance of this change in language was before the Supreme Judicial Court twice in a three-year period. In *Engel v. Thompson*, 336 Mass. 529 (1957) an order for sewer construction was recorded against the title. The court acknowledged that this was not an encumbrance "made" by the grantor, but inasmuch as the grantor could have eliminated it by paying the amounts due it was nevertheless an encumbrance "suffered" by the grantor. When this case was decided, the words "or suffered" had already been removed from the statute. The court, nevertheless, said that the omission of these words was "without significance" and that, although no longer appearing in the text, ought to be implied. As its reasoning the court cited, among other things, the caption of the enabling legislation that was "[f]or the purpose of avoiding the unnecessary use of words in deeds" and (apparently) concluded that "missing words" would be consistent with this purpose and therefore no change was intended in the covenants even though the words "or suffered" had been removed.

Three years later in *Silverblatt v. Livadas*, 340 Mass. 474 (1960) the court reversed itself, holding that the omission of the words "or suffered" was with significance and that the words are not to be implied in the covenants. In *Silverblatt* a lien had been placed on property by the town because the homeowner did not have an acceptable fire escape installed. Clearly the lien was not "made" by the grantor and although it may in some way have been suffered by her it was not something that would subject her to liability under the "modern" covenants.

So, when Mary called John to tell him to remove the attachment from record he was well within his rights to ignore her demand: He did not create the attachment; it was something that another party caused to attach to his title — something that he suffered — and therefore not covered by his covenants.

Q2: When Mary called John the second time, did she have any rights against him?

A2: When Mary called John the second time more than just an attachment on the title was the issue; by then the sheriff was making a move to actually go against Mary's title. This is where the second covenant in Quitclaim Covenants kicked in. The second covenant states that the grantor will "warrant the [granted premises] to the grantee and his heirs, successors and assigns forever against the lawful claims and demands of all persons claiming by, through or under the grantor, but against none other." This covenant is different than the first. The first covenant is concerned with how the encumbrance came to be — whether made (as opposed to suffered) by the grantor — while the second covenant is focused on a category of persons against whom the grantor will defend the title. So, by the time the title is actually being attacked by the creditor — a person whose lien depends upon the title of and therefore claims under the grantor – we have an assault by someone whom the grantor promised he would defend against.

#3. "Anybody Seen Today's Paper?"

Q1: Does Mary Jane have a good title?

A1: Everyone sees the Ibanez issue – here we have Dead Beat Mortgage Company "jumping the gun" and beginning to advertise the foreclosure before it was actually the holder of the mortgage. But did you catch the other error in the foreclosure process? There were three publications in three successive weeks, as required by the statute, but the first one, on May 1, 2007, was "less that twenty-one days before the day of sale," as also required by the statute. So, *Ibanez* notwithstanding, the foreclosure is defective. Fortunately (for Mary Jane) the entry saves the day. The entry is a separate and distinct way of foreclosing a mortgage and is routinely used primarily to "cure" a defect in the foreclosure by sale. When this entry was made (May 18) Dead Beat Mortgage Company in fact did hold the mortgage (albeit it by an unrecorded assignment) and now that three years have expired the foreclosure (by entry) is good, although the foreclosure by sale is (according to the Ibanez court) defective.

#4. "I'll Be There Right Away"

Q1: Do you need to order a municipal lien certificate on Mary's property?

A1: G.L.c. 60, §45 says "the premises conveyed [by a tax deed], both before and after either redemption or foreclosure, shall also be subject to . . . all easements . . . lawfully existing . . . when so conveyed." Essentially this statute tells us that easements are not affected by a tax title. Even though the tax lien is a supreme lien on Mary's property it will not extinguish the easement. A careful conveyancer, however, will run Mary's title for the statutory period (three years and six months from the end of the fiscal year for which such taxes were assessed against Mary) during which time the municipality may file a tax taking, but not thereafter because of the alienation of the interest (easement). The point here is that taxes are generally not a concern with repect to the continued validity of the easement that the dominant estate enjoys over the servient estate.

Q2: After the easement is created is it necessary to keep running Mary as to Whiteacre to see if she has done anything to affect the easement?

A2: Obviously, after John acquired the appurtenant easement you would keep running him to see if he did anything to affect either Blackacre or the easement itself, but it would seem unnecessary to run Mary any longer (with the possible exception for taxes). Keep in mind, however, that after John acquired the easement he might have decided to approach Mary and actually buy the property from her over which the easement existed. That would result in a merger of the easement. If thereafter he sold that property to someone else and did not reserve an easement then when he conveyed Blackacre to your client "together with an easement . . .," your client would not acquire any easement. Rarely would anyone care what happened to the servient estate after the easement was created, but maybe we should be! Something to think about!

#5. "Home Sweet Home"

Q1: What mistake might the bank lawyer have made here?

A1: The separate release of the homestead compromised John's protection under the homestead. Under G.L.c. 188, §7 the release of the homestead by John by a separate document had the effect of wholly terminating any existing protection that John had acquired by reason of the homestead in the first place. Moreover, the effect of re-declaring the homestead, although it put a homestead back in place, did not undo the damage that the release had accomplished — it simply reinstated rights as of the time of the re-declaration — and it allowed creditors who had been "held at bay" to flood in, because the new homestead only provides protection against debts contracted after the new homestead was declared. Obviously, the bank lawyer's intention here was to assure that the homestead would not "trump" the mortgage and would be subordinate to it. Having John sign a separate release of the homestead and then declare a new one accomplished this but at the expense of John's protection against creditors other than the lender in the refinance. What the bank attorney should have done was to utilize a companion statute, G.L.c. 188, §6. That law says that if an owner of property which is subject to a homestead signs a mortgage which contains a release of the homestead the property shall still have the benefit of the homestead, except as against the mortgage. In other words John's rights with reference to other creditors would not be compromised, but with respect to the mortgage his homestead would be effectively "subordinated." It's possible that the bank attorney may hear from John when Macy's tries to take his home for a credit card debt that he incurred before the refinance.

Q2: Were any other mistakes made?

A2: The other mistake that the bank attorney may have made was to forget to ask John if he was married. There's nothing on the record to indicate that he was married — the record is silent on this point — but we all know that if he had a spouse, the spouse would have to join in the mortgage in order to make any release of the homestead effective. So what should the bank attorney have done where the record was "quiet"? Make it "speak" by doing one of two things: ask the question as to John's marital status and then (i) have the spouse, if there is one, join in the mortgage or (ii) if there is no spouse, have the mortgage identify John as a "single person." Once the homestead hits the record, even where title is in just one person, the homestead needs to be dealt with in this way. This is no different than what was required years ago when dower and curtesy were in force: if an individual was conveying property a recitation as to the grantor's marital status would be included if no person identified as a spouse joined in the conveyance in that capacity. In fact, even if the deed into John stated that he was a single man, the same approach would be necessary because he could have married after he took title.

#6. "Time to Pay the Piper"

Q1: Does John's spouse have title to the property?

A1: G.L.c. 208, §34A provides that if a party in a divorce proceeding is directed to give a deed or make a conveyance in connection with a judgment for alimony and the party fails to do so the recording of the decree, after it becomes final, "shall operate to vest title to the real estate or interest therein in the party entitled thereto by the judgment as fully and completely as if such deed, conveyance or release had been duly executed by the party directed to make it." Under this statute (the provisions of which are similar to those in a set of companion statutes, G.L.c. 183, §§43, 44) John's spouse has title.

Q2: What liens affect the title to the property?

A2: This question has a two-part answer. First, what liens caught the title in the first instance and, second, which of those liens, if any, still affect the title?

Under the statutes mentioned the vesting of title in the party entitled to the deed is not complete until the decree is actually recorded. In *True v. Wisniowski*, 13 Mass.App.Ct. 501 (1982), the probate court ordered the husband to convey to the wife. A creditor attached the property in the name of the husband before the decree was recorded. The court noted that the attaching creditor "did not have actual knowledge of the terms of the plaintiff's divorce decree at the time of the attachment," and held that the equitable rights created under the statute (G.L.c. 208, §34A) are expressly made subject to the provisions for recording of notice and that the attaching creditor would have a valid lien against the property notwithstanding the order.

Whether the lack of "actual notice" is pivotal in the case is not entirely clear, but it is safe to say that the IRS likely had no notice (as it does not run out to do titles before throwing on tax liens) and although the court, the obligee (John's spouse) and the IV-D agency are no doubt aware of the order they are beneficiaries of the child support lien and ought not be harmed by such knowledge, which is obviously designed to protect third parties dealing with the title in the name of the obligor. In any event, federal tax liens have a life of ten years from the date of assessment. (Note that the ten years runs from the date of assessment and not the date of recording.) That means that federal tax lien, although it initially caught the title, is no longer an encumbrance against it (although such liens can be extended by refilling within the one–year period ending ten years and thirty days after the original assessment).

The child support lien is still good against the title because it exists for ten years after its "perfection." In this case perfection occurred when the lien was recorded, because at that time John owned the property. That is, once the lien catches property owned by the obligor the ten-year period begins to run, and here the ten-year period has not yet expired.

Something should be said about this concept of the "perfection" of the lien where, when the lien is recorded, the obligor does not own property but subsequently acquires property. In the case of after-acquired property the statute says:

> If the obligor subsequently acquires an interest in real property the lien shall be perfected upon the recording or registering of the instrument by which such interest is obtained in the registry of deeds or registry district in the county or registry district where the notice of the lien was filed within 10 years prior thereto.

Note an important aspect about this provision. If property is acquired after the lien has been recorded the lien will "catch" the property interest if the lien "was filed within 10 years prior thereto." Once this event occurs — the existence on record of a property interest acquired within 10 years of the fling of the lien — "perfection" arises. It is from the moment of this perfection that we begin to measure the duration of the lien as to this after-acquired property — we then begin to count again up to 10 to find out when the lien expires. That is, the first 10-year calculation is to determine if the property interest was timely acquired within 10 years of the filing of the lien (and, if so "perfection" has occurred) and the second 10-year calculation is to determine if the lien, once perfected, remains viable or has expired. Note carefully that under this calculation a lien once recorded could potentially remain in effect for as much as 20 years (and longer if extended).

Stewart Gives Back: Charles River Cleanup

On Saturday, April 24, Stewart associates and their families gave back to the community by participating in the 11th Annual Charles River Cleanup. From left to right the participants were: Johnathan Chipchase (brother of Jennifer Kohler), Office Manager Jennifer Kohler, Vice President and Massachusetts State Manager Craig J. Celli, Claims Counsel Alyssa McClintock, Jonathan Pratt and Stewart Agency Representative Nicole Pratt. Claims Counsel Megan Albert also took part in our fun and rewarding day. Stay tuned for more community outreach by Stewart's Boston office team!

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