

Agent Focus

Title Agent Awarded Fees in Massachusetts UPL Case Underwriter Not Liable for Agent Recording Error

Real Estate Bar Ass'n for Massachusetts, Inc. v. Nat'l Real Estate Information Services, Inc., 642 F.Supp.2d 58 (D.Mass. 2009).

A federal court that entered an injunction against a Massachusetts bar group prohibiting it from pursuing non-lawyers for the alleged unauthorized practice of law, on the overly broad notion that everything relating to conveyancing is the practice of law, has also awarded a substantial fee award to the title agent it sued.

The order granting the injunction against the Real Estate Bar Association for Massachusetts, Inc. ("REBA") was reported in the May, 2009 issue. REBA sued National Real Estate Information Services, Inc., a Pennsylvania title agent and vendor manager provider of other real estate settlement services, claiming that a number of its activities are the unauthorized practice of law. In entering the injunction, the court invoked the "Dormant Commerce Clause," which allows the federal government to strike down state actions that impede interstate commerce. The historic rulings by the court are discussed in full in the May article and the decision, found at 609 F.Supp.2d 135.

NREIS then asked for its attorneys' fees, as the prevailing party, under 42 U.S.C. § 1988. REBA made a number of arguments as to why a fee award would not be appropriate, such as that the entering of a permanent injunction did not make NREIS the prevailing party, and that such an award would chill free speech. The court brushed off those arguments in convincing fashion. It spent the majority of the lengthy opinion analyzing the reasonableness of the fees.

The court concluded that the vast majority of the 2,200 hours spent by K & L Gates were justified, and that the attorneys' rates between \$325 and \$700 an hour were reasonable. It awarded about \$900,000 in fees.

Nechadim Corp. v. C.J.P. Abstract, LLC, — N.Y.S.2d —, 2009 WL 3647883 (N.Y.A.D. 2 Dept.), 2009 N.Y. Slip Op. 07993.

Because a title company was the agent of the underwriter only for policy issuance, the underwriter was not responsible for the title company's failure to promptly record a mortgage.

Nechadim Corporation made a mortgage loan to be secured by a mortgage on two properties in two different counties. At closing, Nechadim handed the mortgage (apparently only one instrument) to C.J.P. Abstract, LLC for recording. It was recorded right away in one county, but there was a lapse of time before it was recorded in the other county. Something bad happened in the interim that the decision does not identify. Nechadim sued CJP and its underwriter, Commonwealth Land Title, for recording negligence.

Commonwealth moved for summary judgment, which the trial court denied but the appeals division granted on reversal. The court said that Commonwealth had proven that the agency relationship between it and CJP was limited to issuing title insurance policies. The court ruled that "CJP's failure to timely record the mortgage thus cannot be attributed to Commonwealth," citing *Ford v. Unity Hosp.*, 32 N.Y.2d 464, 472-473, 346 N.Y.S.2d 238, 299 N.E.2d 659; and *Lucas v. Kensington Abstract LLC*, 20 Misc.3d 1135[A].