Unauthorized practice of law in the year 2011: What issues remain?

As we enter 2011, states are dealing with many leftover issues from 2011, perhaps none getting more focus than the foreclosure crisis. Legislatures, regulators and courts are all taking action in light of the information that has come to light regarding questionable foreclosure processes, and from that, the original settlement process.

These investigations are bringing to light many fundamental questions, such as "who actually conducted the settlement or acknowledged the foreclosure documents?" And with those questions come issues of the unauthorized practice of law (UPL), which in attorney states will only become more of a focus for state bar associations as they attempt to sort out the lines that have been continually blurred over the last several years.

"Its that blurring of the lines of, if the law firm is going to hire a notary, what is the notary's role? And secondly, if it is a title company hiring an attorney, is that title company practicing law?," said **George Holler**, of the Milford, Conn.-based Holler Law Firm LLC.

These questions and more will undoubtedly be addressed by states in the coming year, and in fact are being addressed in some states now. *The Legal Description* has identified some of the important UPL issues being addressed currently, and is sharing what industry experts are saying industry members should do to protect themselves from the issues potentially on the horizon.

All eyes on *REBA v. NREIS*

The most important UPL case going through the court system over the last few years is *The Real Estate Bar Association of Massachusetts v. National Real Estate Information Services Inc.*, and it looks like it will remain an item to watch in 2011.

In its case, the Real Estate Bar Association of Massachusetts Inc. (REBA) sought declaratory and injunctive relief, claiming that certain activities National Real Estate Information Services Inc. (NREIS) engaged in constituted the unauthorized practice of law under Massachusetts General Laws Chapter 221, Sections 46 and 46A.

The federal district court in Massachusetts declared the practices at issue did not constitute the unauthorized practice of lawand issued injunctive relief and declaratory relief against the bar association, finding for NREIS on its counterclaim that REBA's filing of the lawsuit in state court had violated the Dormant Commerce Clause of the Constitution.

The 1st U.S. Circuit Court of Appeals reversed the district court's decision in favor of NREIS, which was sued for allegedly violating Massachusetts' unauthorized practice of law (UPL) statutes and certified two questions for the Massachusetts Supreme Judicial Court (SJC), which heard oral arguments from the parties on Nov. 2.

The questions certified to the SJC essentially ask the court to define what aspects of the real estate conveyancing process are considered the practice of law and whether the ministerial parts of the process can be separated out and conducted by nonlawyer entities.

“How [this decision impacts] any change in practice is really dependent on whether the SJC determines that you can somehow parcel out each of these activities and say ‘these activities need to be performed by an attorney directly and these other activities can be performed by the closing company,’ or that they are so integrated as one single process that an attorney needs to handle those activities directly or handled by a non-attorney under an attorney’s supervision,” said **Ward Graham**, senior underwriting counsel for New England at WFG National Title Insurance Co.

While many vendor management companies and national agencies are looking to see what the SJC determines and, ultimately, how the 1st Circuit rules in the case, the overall impact of the decision is yet to be known.

“One thing to bear in mind is that this case has somewhat limited issues in that it is based upon a statute that prohibits the practice of law by corporations that purport to represent clients,” Graham said.

“As we know, both South Carolina and Delaware have case law that tends to come down on the side of ‘everything that touches the transaction is the practice of law,’ and life goes on in both of those jurisdictions,” said **Steven Winkler**, chief underwriting counsel and secretary for Williston Financial Group, noting that should the SJC rule that every aspect of the conveyancing process is the practice of law, vendor management companies will adapt to the changes.

Holler agreed, saying that a Delaware of South Carolina decision would carry more weight in Massachusetts than the SJC decision will have in other attorney states because those states have defined the issue already.

The real impact could be felt if the 1st Circuit ultimately rules in favor of NREIS on its Dormant Commerce Clause counterclaim, in which it argues that requiring the use of attorneys in all aspects of the conveyancing process would be in violation of the Dormant Commerce Clause of the Constitution.

“We know from attorneys in the state of North Carolina who work with various Title/ Appraisal Vendor Management Association (TAVMA) members that their UPL committee continues to monitor very closely the *REBA* lawsuit in Massachusetts,” said **Ed Krug**, of the Law Offices of Edward J. Krug and president of TAVMA. “I believe they are probably not alone. If the *REBA* decision does end up going in favor of national companies, that will probably put a fairly significant crack in the control that bar associations have been able to maintain over the closing process.”

Judgment handed down in S.C.

Eyes have now also turned to South Carolina, in which the Court of Appeals of South Carolina and the Supreme Court of South Carolina have handed down decisions that can be read for the proposition that if a loan is closed in violation of the UPL Laws, that certain court remedies may not be available to the lender in the subsequent foreclosure action.

In those cases, *Matrix v. Frazer* in the Supreme Court of South Carolina and *Wachovia Bank v. Coffey* in the Court of Appeals of South Carolina, the courts found that the plaintiffs were not entitled to equitable remedies because they closed the transactions unlawfully, and thus had unclean hands.

In *Matrix*, **Louis** and **Linda Frazer** purchased a home with Matrix Financial Services Corp. in January 2001. **Matthew Kundinger** enrolled a default judgment against before the Frazers closed a refinance mortgage with Matrix. In Matrix's foreclosure action, the master-in-equity granted Matrix equitable subrogation, giving the refinance mortgage priority over Kundinger's judgment lien. The Supreme Court of South Carolina reversed the decision. It held that Matrix was not entitled to an equitable remedy because it closed the refinance loan unlawfully, and thus had unclean hands.

"Matrix hired LandAmerica OneStop to perform the title search, prepare the documents, and close the refinance loan–all admittedly without the supervision of a licensed attorney. Thus, Matrix has committed the unauthorized practice of law in closing the refinance mortgage, clearly violating South Carolina law. The dissent's protestations aside, a party cannot violate the law and expect not to bear the consequences of its actions. This Court will not grant a discretionary, equitable remedy to a party who refused to follow the laws of this state. Therefore, even if Matrix were able to satisfy the requirements for equitable subrogation, Matrix would not be entitled to that equitable remedy because it has unclean hands," the court stated in its opinion, handed down on Aug. 16, 2010.

In *Coffey*, Wachovia closed a home equity loan for Dr. **Michael Coffey** without the supervision of an attorney and later instituted foreclosure proceedings. The Court of Appeals of South Carolina found that because Wachovia had committed the unauthorized practice of law, it came to the court with unclean hands and, therefore, it was not entitled to equitable relief.

There was some dissent on the bench when the Supreme Court of South Carolina reached its decision in *Matrix*. Justice **John Kittredge** concurred, but in a separate opinion, opining that he would reverse the judgment of the trial court "only because Matrix, as a result of its unlawful conduct, is not entitled to the benefit of having its lien equitably subrogated over Kundinger's judgment lien." Justice **Costa Pleicones** dissented, arguing that "the majority creates a new rule that equity will not aid a party that violated South Carolina law in closing mortgage because that party has unclean hands.' He said he believes this rule may have chaotic unintended consequences. However, these cases may still have a significant impact across the country.

“These cases were decided by the highest courts sitting in South Carolina; therefore they are only absolute and binding in the state of South Carolina,” said **Jamie Kosofsky**, partner at the Matthews, N.C.-based firm of Brady & Kosofsky PA. “[However,] the defense of unclean hands is recognized in almost every jurisdiction in the country, which means it could be applied in almost any jurisdiction in the country. The real danger to the servicers and banks is if the foreclosure defense bar and mass litigation bar discovers these cases, the above cases could be applied across the country which would render hundreds of billions of loans unenforceable. In the future should the banks and servicers continue to utilize illegal methods of closing and settlement, they will run the risk of losing any and all security in new loans.”

“The *Matrix* and *Coffey* cases present the Servicers and Banks with a simple choice: Follow the laws of the various states in originating the loans and do away with the ‘one size fits all’ solution, or you run the risk of having no recourse against a non-paying borrower,” he continued.

Train yourselves and your non-attorney closers for potential changes

As things heat up in these and other states, especially in the aftermath of the foreclosure crisis, it is important for industry members to be aware of the issues emerging in every jurisdiction they work in and to train their employees about how these changes will affect their processes and procedures.

In particular, notary closers could be under particular siege in attorney states in light of the revelations of the foreclosure crisis.

“I think that in those states where the UPL issues are there, there is going to be a lot of scrutiny on notary closers … because of the general UPL position, but also on the heals of the foreclosure issues,” said **Charles Cain**, senior vice president, agency manager, Midwest region for WFG National Title Insurance Co. He said that while notary closers have been known for the quality assurances they provide, the fact that consumers in some of these transactions weren’t able to ask questions at the closing table because of the use of notary closers could even be a topic of debate.

Cain also said that in states where the use of notary closers is already commonplace, the debate might not be on the use of notary closers, but state regulators may choose to require licensing and other requirements for notaries to work in various states and that states may spend more time looking at the closing process.

Krug noted that lenders themselves also seem interested in vetting the notaries that are used in the process and protecting themselves from liability if anything goes wrong.

“They not only require through service-level agreements that these notaries undergo some sort of background check, but that they also have a certain amount of experience and that they carry liability insurance as well,” he said. “Even though the actinos of these particular notaries are covered when pursuant to the functions there were hired to

perform, there is still a requirement now that agencies and VMCs engage notaries who are properly insured or bonded in the event that they handle any funding."

All of these changes mean that industry members need to train themselves and their employees so that they can better protect themselves from potential liability.

"Even in jurisdictions that are not traditionally viewed as attorney states, there are still significant constraints on non-lawyers providing legal advice," Winkler said. The biggest risk is that an experienced notary who may know the process will try to answer questions of the borrower when they absolutely should not be."

Winkler also pointed out that if an agency is going to deliver services across state lines, its management team must become familiar with the practices and customs of the new jurisdiction.

"Training and education are very important," Graham said in agreement. "Without knowing you are dealing with somebody that has the necessary training and education and experience to recognize even little issues, it could have a huge impact on the parties to the transaction. [This is particularly true] for the lenders nowadays." He gave the example of a faulty acknowledged mortgage that was invalidated by the bankruptcy court, pointing out that in that situation, there is no way the mortgage will be foreclosed, leaving the lender as an unsecured creditor in the case.

Break Out Box: Protecting your notaries, and yourself from UPL issues
With all of the changes on the horizon, and the potential for several states to consider requiring closing agents and notary closers to be licensed in the next few years, it is important to remind your staff and those you hire for closings to be reminded of basic good practices to avoid stepping over the UPL line.

- Krug said that one of the most important things for the agencies and VMCs recruiting notaries to remember is to recruit notaries that have experience in real estate transactions.
- Agency managers should also properly educate those notaries as to the exact extent of what they are expected to do at the settlement, Krug also said.
- Managers should monitor their notaries' activities and try to obtain some critical reviews of their performance, Krug noted.
- **Michael Robinson**, executive director for the National Notary Association (NNA) teaches notary signing agents to be clear about their role from the beginning of a closing. The NNA provides those who go through their program with a pledge of ethical practice they can hand to consumers to help explain that role.
- Notary closers should watch out for the three W's: what, when and why, said Robinson. He said during its training, the NNA instructs notary signing agents to either point to the document if the information being requested can be found there, or call one of the principals involved in the transaction and have them answer the question for the consumer.