

# 1st Circuit reverses decision against Mass. real estate bar group

**Finds that group should not have been subjected to fees for simply bringing declaratory judgment suit.**

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The U.S. Court of Appeals for the 1st Circuit has vacated a lower court's order that the Real Estate Bar Association for Massachusetts Inc. pay a litigation opponent \$904,076.17 in attorney fees and costs.

The 1st Circuit's June 21 unanimous panel ruling in *The Real Estate Bar Association for Massachusetts Inc. (REBA) v. National Real Estate Information Services* also vacated a legal ruling against REBA and sent legal questions to the Supreme Judicial Court of Massachusetts.

In the underlying District of Massachusetts case, REBA asked the court for a declaratory judgment that National Real Estate Information's so-called notary closings, which use nonlawyers for the title and monetary settlement parts of residential real estate closings, constitute the unauthorized practice of law.

The 1st Circuit wants the Massachusetts high court to weigh in on two questions. The first is whether National Real Estate Information's activities constitute the unauthorized practice of law under state law. The second is whether National Real Estate Information is violating state law by hiring Massachusetts attorneys to attend real estate closings.

Chief Judge Sandra Lynch wrote the opinion [reversing](#) an April 13, 2009, ruling by Judge Joseph Tauro of the District of Massachusetts. That ruling held that REBA violated the dormant commerce clause of the U.S. Constitution in the way it interpreted the Massachusetts unauthorized practice of law statutes and for simply bringing the suit against National Real Estate Information.

The dormant commerce clause doctrine, which refers to court interpretation of the U.S. Constitution's commerce clause, restricts states from placing unwarranted burdens on interstate commerce.

Lynch wrote that because REBA is a private organization, not a state actor, it cannot have violated the dormant commerce clause. Lynch also wrote that REBA's lawsuit is protected by the Constitution's First Amendment.

"No party bringing suit should fear that its nonfrivolous advocacy of a reasonable position in federal court will, on that basis alone, lead to an injunction and declaration against it based on the dormant Commerce Clause," Lynch wrote. "Much less should a party be made, based on its conduct in bringing such a suit, to fear the imposition of attorney's fees. Further, this is a pure issue of law; no party is harmed by the absence of fact finding."

The ruling was crucial to the 2,400-member REBA because it wouldn't have been able to survive a \$904,000 judgment against it, according to its lawyer on the case, Douglas Salvesen, a shareholder at Boston-based Yurko, Salvesen & Remz. "It saves a 150-year-old organization from almost certain death," Salvesen said.

Salvesen said the 1st Circuit's declaration that filing a lawsuit is an exercise of First Amendment rights was also important. "We are pleased that the court recognized some of the flaws and inconsistencies in the lower court's reasoning," said REBA President Tom Moriarty, in statement. "We look forward to the opportunity to make our case at the [Supreme Judicial Court]. We are grateful to our allies, the [Massachusetts Bar Association] and the [Boston Bar Association] and we welcome their further support."

Neither National Real Estate Information nor its lawyer, Michael Ricciuti, a Boston litigation partner at K&L Gates, responded to requests for comment.

In February, the Boston and Massachusetts bar associations [each filed an amicus brief](#) supporting different aspects of REBA's position.

The Boston Bar's brief disputed Tauro's award of fees and costs to National Real Estate Information. The Massachusetts Bar's brief challenged Tauro's rule restricting the role of lawyers in residential real estate closings in Massachusetts.

**Requiring lawyers to handle residential real estate transfers is important because "the public should be confident that the people assisting individuals in real estate transactions have the education, expertise and especially the ethics," to do so, said Robert Muldoon Jr., a litigation partner at Boston's Sherin and Lodgen, and the Massachusetts Bar Association's counsel on the brief.**

For the Boston Bar Association, the 1st Circuit ruling "is a reaffirmation that bar associations and, really, for that matter, all of us have a right to petition the courts for redress of grievances without fear that the mere act of filing the lawsuit exposes you to liability," said Jonathan Albano, co-author of the association's brief and a partner in the Boston office of Bingham McCutchen.

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