

Dear Stewart Partners,

As always, we hope all of you, your staff, colleagues, and families are doing well. We are glad to see that new Covid infections in Massachusetts and other New England states have dropped significantly this week from last, and we are hopeful that this is the beginning of a continual decline as we head into these last few months of winter. In this week's update, we are continuing with our "In Case you Missed It" section, where we are highlighting a legal case we reported during 2021. We are also including details on a recently decided case that relates to contractual provisions and 93A, which you may find interesting.

In addition, this week's update includes a link to our recently issued bulletin on the First-Time Homebuyer Discount available to qualifying homebuyers. We are also sharing a warning from the FBI about fraud and QR codes.

As a reminder, if you haven't already done so, we've included a link to register for our upcoming webinar being presented by our Massachusetts Underwriting Team. Hope to see you all at the webinar.

- [*In Case You Missed It – important cases from 2021*](#)

Conservation Commission of Norton v. Pesa, 488 Mass. 325 (2021)

Many of you are familiar with orders of conditions issued by local Conservation Commissions in the course of land development. Once recorded, the orders provide notice that an owner of land has been given permission to construct or alter the property in accordance with certain conditions designed to preserve and protect wetlands on or near the property. Although these orders are recorded with the Registry, they are not a defect in title, nor do they affect the marketability of the title, as was explained in *Lyon v. Duffy*, 77 Mass. App. Ct. 860 (2010). The orders require the owner to obtain a certificate of compliance, which would confirm that the work was completed in compliance with the order. In this case, the Conservation Commission of Norton sought an enforcement action against the current owner of the property based upon an order of conditions issued in 1979. The Commission first became aware of the potential violation of the order in 1984 and notified the then owner (who had undertaken the work at the property), but nothing further was done. In 1996, he conveyed the property to himself and his wife as tenants by the entirety. In 2014, his surviving spouse sold the property to the current owners, the Pesas. The Pesas and the Conservation Commission engaged in discussions regarding the requirements to obtain the certificate of compliance, which included completion of certain work required by the original order; however, they disagreed on whether certain fill needed to be removed. In 2015, the Conservation Commission brought an enforcement order seeking removal of the fill and ordering the property to be returned to its original condition.

The Pesas claimed that the period to bring an enforcement action expired, based on their interpretation of the statute of repose contained in GL c. 131, s. 40. They argued that the statute required actions be brought within three years after the first subsequent owner purchased the property, and in this case because the original owner had already transferred the property to himself and his wife in 1996, any enforcement action needed to be brought within three years after that first transfer. As the third owner of the property after issuance of the order of conditions, the Pesas argued that that the Conservation Commission was barred from bringing the action. The lower court agreed with the Pesas, and the Commission appealed.

The Supreme Judicial Court overturned the lower court's decision and held that the statute of repose in GL c. 131, s. 40 is personal and doesn't run with the land. Rather, the three-year time period begins anew with each conveyance of the property. It is important to note that the statute does not provide a time limit during which a conservation commission must bring an action to enforce; instead the statute prohibits a conservation commission from bringing an enforcement action against an owner three years after recording of the deed into that owner.

This decision has an impact for purchasers of lands which are subject to an order of conditions, as liability for an existing violation can be imposed for a period of three years after the buyer acquires title. This could also present a problem for a seller with an open order of conditions, even if the seller has owned the property for more than three years, because buyers may not want to assume that liability. To read the full decision, follow this link:

<http://masscases.com/cases/sjc/488/488mass325.html>

- *Contractual Provisions and GL c. 93A*

H1 Lincoln, Inc. v. South Washington Street, LLC (SJC 13088)

The Supreme Judicial Court issued this decision on January 24, 2022. The case involves a commercial lease but has applicability beyond the strict confines of landlord tenant law in that the Court addressed whether a contractual provision limiting damages under the Massachusetts consumer protection statute, known as GL c. 93A, is enforceable. The defendants argued that their conduct did not rise to the level of being actionable under GL c. 93A §11, and that even if their action had violated the statute, the plaintiff could not be awarded damages under the statute because the lease between the parties contained a limitation of liability provision, whereby the plaintiff had waived its claims to be compensated for "speculative or consequential damages." The court concluded that the conduct of the defendant was indeed unfair and deceptive and most importantly, defendant's conduct was willful. The court held that the limitation of liability provision in the lease did not provide protection against c. 93A claims when the conduct is willful or knowing.

It is clear from the decision that while contractual provisions can be used to limit liability, they do not provide complete insulation from potential claims under c.93A, even in a commercial setting if the offensive conduct is done knowingly or willfully. To read the full decision, follow this link: <https://www.mass.gov/files/documents/2022/01/24/k13088.pdf>

- *First-Time Homebuyers Discount – Bulletin: MA2022001*

Last week we issued a reminder bulletin on the First-Time Homebuyers Discount on policies issued for Massachusetts properties. To qualify for the discount, the buyer may not have owned a home in the last three years, must be purchasing a primary residence, and is purchasing a Homeowner's (Enhanced) policy of title insurance. If the buyer qualifies, a discount of 10% of the total title policy premium is available to the buyer. As an agent, your portion of the premium remains the same, and is calculated as if no discount was given. The reduction will be applied to portion of the remittance sent to Stewart. A copy of the bulletin can be viewed here: <https://www.virtualunderwriter.com/en/bulletins/2022-1/ma2022001.html>

Should you have any questions, please don't hesitate to contact your Account Representative.

- [FBI Warns Against Rise of Malicious QR Codes](#)

Most of us have come to be very familiar with QR Codes, especially during the pandemic, when physical menus disappeared from every restaurant and the only way to view a menu was to use your phone's camera to open a QR code which was taped to the corner of the table. There are a host of other uses for these codes and many businesses use them legitimately as they provide convenience and contactless access and payment methods. Cybercriminals, however, are taking advantage of this technology by directing QR code scans to malicious sites to steal victim data, embedding malware to gain access to the victim's device, and redirecting payment for cybercriminal use. The FBI has issued a warning to raise awareness of the cybercriminals' use of malicious QR codes. To read the announcement follow this link: <https://www.ic3.gov/Media/Y2022/PSA220118>

- [Upcoming Education from Your Local Stewart Underwriters](#)

- Date: February 9, 2022 at 10 AM

- Topic: **2021 Basic and Expanded Loan Policy Forms – What You Need to Know**

- Speakers: Jutta Deeney and Shannon Coleman

- To Register for this Webinar, follow this link:

- <https://stewart.webex.com/stewart/k2/j.php?MTID=tbe0abc309eb773f482d774b752b577fb>

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