

Dear Stewart Partners,

As always, we hope all of you, your family, friends and colleagues are doing well and enjoying the warm New England summer.

In this week's update you will find a case summary for a recent decision from the U.S. District Court for the District of Massachusetts that analyzed whether a buyer and seller were bound by a fully-executed offer to purchase which contemplated the execution of a purchase and sale agreement that never got signed. The case is of interest to practitioners who represent buyers and sellers in the negotiation and sale of property in Massachusetts. It highlights the potential risk to a seller for consequential damages in addition to specific performance.

For our cross-border agents, who also practice in New Hampshire, we want to let you know about the New Hampshire Bar Association's Real Property Law Section's upcoming open meeting. Stewart's New Hampshire State Underwriting Counsel, Michelle Radie-Coffin, chairs this important section. For full details, please see below.

Lastly, we want to share with you an article we found interesting. As it seems that many places where we live and practice are becoming unaffordable, we were happy to see that two states in New England landed on Realtor.com's 10 Best and Affordable Places to Retire.



Ritter v. Johnson (D. Mass. 2022)

A recent case from the U.S. District Court serves as a reminder to practitioners that an offer to purchase can be binding on the parties, even when it contemplates entering into a purchase and sale agreement at a later date.

Here, the buyers submitted an offer to purchase ("OTP") property on Martha's Vineyard. The OTP identified the property, the purchase price, the deadline for execution of a purchase and sale agreement, and the closing date. Additionally, the OTP listed several contingencies including the sale by the buyer of some property in Virginia, the delivery of a Title 5 test by the seller, and the signing of a "mutually acceptable" P&S. Importantly, the OTP explicitly stated that it was a legally binding contract and that it would be enforceable both at law and in equity if the seller failed to fulfill his obligations under the agreement. Both the buyer and seller signed the OTP.

Both parties satisfied most of the contingencies listed in the OTP (including the sale of the buyer's Virginia property and the seller's delivery of the Title 5 results), and their attorneys negotiated a P&S. However, when it came time to sign, the seller refused and sought to terminate the transaction. The buyers sued in federal court for breach of contract, breach of the covenant of good faith and fair dealing, and promissory estoppel.

In finding that the buyer was entitled to summary judgment on the breach of contract claim, the Court relied heavily on the SJC's decision in *McCarthy v. Tobin*, 429 Mass. 84 (1999). In *McCarthy*, the SJC held that if parties have agreed upon all material terms, the offer is enforceable and the P&S serves as a "polished memorandum of an already binding contract."

While the seller argued that the OTP was not enforceable because the parties did not satisfy all the contingences set out in the OTP, specifically the signing of a "mutually acceptable" P&S, the Court disagreed. Like *McCarthy*, the OTP in this case included the sufficient material terms to the agreement. The OTP also stated that it was a legally binding contract. Notably, it did not include a statement that the parties did not intend to be bound until the execution of a formal agreement, which was suggested by the *McCarthy* court as one way to avoid having the OTP become a binding contract.

This could be a costly result for the seller in this case. Not only is the buyer asking for specific performance, but they are also seeking damages because they will now have a much higher interest rate on their mortgage.

This decision reaffirms that a binding contract to convey property can be made at the offer stage, and practitioners should make sure their buyer and seller clients – and their realtor colleagues – understand this.

To view the decision, follow this link: <https://casetext.com/case/ritter-v-johnson-2>



Save the Date – NH Bar Association Real Property Section Meet & Greet

The NH Bar Association Real Property Section invites all New Hampshire bar members to attend its upcoming "Meet & Greet" to socialize and discuss goal setting and objectives for the upcoming membership year. One of the topics suggested for this year is putting forth legislation for a statute of limitations on old mortgages. Presently, while the states surrounding New Hampshire have such legislation, New Hampshire does not.

This meeting will take place on Wednesday, September 14, 2022, from 5:30 -7:30 PM at McLane Middleton Professional Association, 10th Floor Main Reception Area, 900 Elm St., Manchester, NH. Light refreshments will be provided.

Please RSVP to jdauphinee@nhbar.org by end of day September 9th.



Portland, ME and Concord, NH make Realtor.com's 10 Best – And Most Affordable – Places to Retire in America

Portland, Maine landed at number 2 and Concord, New Hampshire landed at number 9 on Realtor.com's 2022 list of the best and most affordable places to retire. To see who else made the list and read why Portland and Concord are so attractive, following this link:

<https://www.realtor.com/news/trends/the-10-best-affordable-places-to-retire/>



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