



Dear Stewart Partners,

In this week's Mid-Week Update, we discuss a recent Stewart Bulletin outlining important guidance on whether certain government-backed loan modifications require a payoff and release. We also include a discussion of Escrow Agreements and the role of the escrow agent, and we take a closer look at waterfront property conveyances in Vermont.



**Loan Modifications and Subsequent Sales by Borrowers / Homeowners**

On Monday, Stewart issued Bulletin SLS2023020 regarding loan modifications in the chain of title. As explained in the Bulletin, starting in 2008, several government-backed loan modification programs (including the Home Affordable Modification Program (HAMP)) were created to assist struggling borrowers by bringing monthly mortgage payments to an affordable level and avoid foreclosures.

Many of these programs achieved these goals by deferring the payment of a sum of money owed by the borrower. This sum, sometimes called a Partial Claim, stops accruing interest for the borrower, but requires payment in full at the time of a sale or refinance. Because these Partial Claims Mortgages rarely require monthly payments, borrowers are often unaware that these modifications result in an additional encumbrance on their home. Further, some lenders identify Partial Claim mortgage loans with the same loan number as the primary or first mortgage loan.

If your title search discloses a modification of an existing lien, the recorded modification document must be reviewed carefully and in its entirety to determine if the modification secures a mortgage or deed of trust to HUD or otherwise requires a payment to HUD.

If the modification references a Partial Claim or states that it is a mortgage or deed of trust granted to HUD, the issuing office must obtain payoff information from the Secretary-Held Mortgage Servicing Contractor, pay the claim in accordance with the payoff instructions, and follow up to confirm the release is received and/or recorded. You should not rely on a statement from the primary or first mortgagee that no payoff or additional funds are due as a result of the modification or Partial Claim. The current HUD mortgage servicing contractor for Partial Claim Mortgages is Information Systems & Networks Corporation (ISN) and payoffs can be requested through the following email: [PCPayoffs@hud.gov](mailto:PCPayoffs@hud.gov)

For more detailed information from HUD, please follow this link: [National Servicing Center](#)

If you have any questions relating to this Bulletin, or you encounter a loan modification document in your title and are not sure whether an additional payoff is required, please contact your local underwriting counsel.

You can read the Bulletin in its entirety here: [Bulletin - SLS2023020](#).



## **Drafting Escrow Agreements**

A few months ago, we provided a brief overview of escrow agreements, which are used regularly in real estate transactions. One of the primary functions of an escrow agreement is to bind the parties to certain terms and conditions that must be met to ultimately release escrowed funds to the proper recipient. Prior to closing, escrow agreements are often used to govern the holding of the deposit in escrow in connection with a purchase and sale agreement. At closing, escrow agreements are used to govern the holding of funds for repairs to the real property that cannot be finished by the closing date or for unreleased liens such as mortgages or estate taxes.

The role of the escrow agent (which is typically the buyer's or seller's counsel or title company) is to make sure that all terms and conditions are met in accordance with the escrow agreement. The terms and conditions often include satisfying contingencies, obtaining necessary inspections, and fulfilling financial obligations. The impartial escrow agent ensures both parties fulfill their obligations. The escrow agent will also handle the actual disbursement of all money being held.

In theory, an escrow agreement may not seem very complex. However, a poorly drafted escrow agreement may fail to properly set forth the rights and responsibilities of the escrow agent and other parties, and lead to liability. Accordingly, following is a list of items that should always be included in any escrow agreement:

1. Date - the escrow agreement should be dated.
2. Parties - the parties should be identified exactly as shown in the closing transaction (i.e. seller and buyer).
3. Escrow Agent – the escrow agent must be identified and sign as a party to the escrow agreement.
4. Subject Matter - the escrow agreement should clearly set forth the conditions to be satisfied or performed prior to the escrowed funds being released by the escrow agent.
5. Timeframe - the escrow agreement should have an expiration date and clear instructions for the escrow agent to follow if conditions have not been satisfied or performed by the expiration date.
6. Dollar Amount – the exact amount of money being held in escrow should be set forth. If the escrowed funds are being invested in an interest-bearing account, designate who is entitled to the earnings, if any. If the escrowed funds are not invested, state the escrowed funds will be held in a non-interest-bearing account.
7. Interpleader action – in the event of any disagreement between the parties or the escrow agreement expires without satisfaction of the conditions, the escrow agent

should have the right to commence an interpleader action or otherwise surrender the escrowed funds to a court of competent jurisdiction for disposition as may be directed by the court. The escrow agreement should state that the escrow agent will not be liable in any way for refusing to comply with any conflicting instructions or adverse claims or demands, and it will be entitled to continue to refrain from acting until the escrow agent is notified in writing by all other parties to the escrow agreement that a settlement has been reached, or shall have been determined by a court of competent jurisdiction.

8. Release of Escrowed Funds – The escrow agreement should provide clear instructions for escrow agent's release of escrowed funds. Typically, the parties will provide the escrow agent evidence that all conditions of the escrow have been satisfied, along with written instructions to release the escrowed funds. It is important to note that in most cases, the escrow agent's role is not to determine if conditions have been satisfied as the escrow agent is acting in an administrative role only.
9. Indemnification and Liability – The parties should indemnify the escrow agent for any actions that it takes in good faith pursuant to its performance under the escrow agreement. Also, the escrow agreement should state that the escrow agent shall not be liable to the other parties for any act or omission on its part unless the escrow agent acted, or failed to act, in bad faith or with gross negligence or willful misconduct.
10. Resignation – the escrow agent should have the right, at its sole discretion, to resign by giving prior written notice to the other parties. In such case, the parties should be required to furnish to the escrow agent written instructions for the release of the escrowed funds. If the escrow agent does not receive such instructions within a stated time frame, the escrow agent may petition any court of competent jurisdiction for the appointment of a successor escrow agent.

Please note this list is a general guide to refer to when drafting an escrow agreement; every transaction is different and may require additional information or procedures depending on the circumstances at hand. If you have additional questions or want more information about escrow agreements, please contact your local underwriting counsel or account representative.



## **Purchasing Waterfront Property in Vermont**

Vermont is home to thousands of freshwater lakes, rivers and ponds including Lake Champlain, which is one of the largest freshwater lakes in the US with hundreds of miles of shoreline. Owning waterfront property has become increasingly popular with the demand surging well past the supply in recent years and home prices hitting record highs. Despite the obvious advantages of waterfront home ownership, there are a few considerations to be aware of for attorneys.

### **Shorelands Protection Act**

In 2014 Vermont passed a Shorelands Protection Act requiring landowners to obtain a Shorelands Protection Permit for any development within 250 feet of the mean water level of qualifying lakes and ponds throughout Vermont.

Now, in addition to local permitting requirements, a state Shoreland Protection Permit is required for any new development, redevelopment, or clearing that is not otherwise exempt. Exempt activities as well as standards for reviewing permit applications are detailed here. [The Vermont Shoreland Protection Act](#)

All Shoreland Protection Permits are required to be recorded in the Land Records of the municipality in which the property is located. The state also maintains a database of pending applications and issued permits. Learn more about the Shorelands Protection Act and search for permits here: [Shoreland Permitting](#)

### Zoning Considerations

When conducting the title search, confirm that the property is zoned for and approved for year-round occupancy. Just because the property is suitable for year-round residency does not mean that it is approved for that use. This may involve a review of the municipal zoning ordinance and a deep-dive into the property's permitting records and historic use.

In addition to year-round use considerations, attorneys should research and disclose any restrictions in the municipal ordinance that restrict short-term occupancy of the property if the purchaser intends to rent out the waterfront property for investment purposes. As discussed in a prior midweek update, several Vermont municipalities have begun to regulate short-term rentals both for land use and tax purposes, which have been viewed as quite restrictive by some homeowners.

### Leasehold Considerations

There are a number of waterfront communities in Vermont where the property is leased rather than owned in fee. With leasehold properties, the homeowner owns the structure only, not the land beneath it, and is subject to monthly or annual costs to cover lease fees and property maintenance. While this is an attractive option for some, leasehold communities like these often restrict the homeowner's ability to use the property year-round, and they limit a homeowner's ability to modify the property.

### Flood Considerations

With record rainfall in recent years, Vermont has seen historic flooding. In 2023, there was catastrophic flash flooding throughout the state that caused an estimated 2.1 billion dollars in property damage. Vermont does not have any mandatory flood risk disclosure laws for real estate transactions, leaving many prospective homeowners uninformed about the risk that their home could be flooded or that it may have been flooded in the past. This article highlights the dangers of not mandating these disclosures. [Flood Considerations Article](#). Until flooding disclosures are mandated by the state, attorneys should look at the information contained on the Sellers Property Information Report (SPIR) with respect to any disclosures on previous flooding and can search the FEMA flood mapping portal to determine whether the property is located in a high-risk area [FEMA Flood Map Service Center](#). Attorneys may also want to remind purchasers to consider obtaining flood insurance coverage when acquiring their homeowners insurance policy.

## Water Safety Considerations

Swimming in water contaminated with micro-organisms can cause illness, even with limited exposure. As such, waterfront purchasers should be aware of some important safety, testing and monitoring information published by the Vermont Department of Health (DOH) that can help people make informed decisions before swimming. The DOH recommends regular testing of recreational water from May-September and offers Swim Water Testing kits for homeowners to test their private beach water for a fee of \$15.00 per kit, which includes the kit and a safety analysis of the results. [Swim Water Testing Article](#)



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