New England Regional Midweek Update
3/13/2024

Dear Stewart Partners,

Although we lost an hour of sleep this weekend thanks to Daylight Savings Time, we should soon see buds on trees and flowers poking up from the ground. Before you know it, the long days of summer will be back. In this week's update, we review upcoming changes to IOLTA rules in Massachusetts, a highly controversial real estate-related bill pending in Maine's legislature, and a recent Maine Supreme Judicial Court decision that finally overturned some troubling foreclosure-related precedent.

New IOLTA Changes to take effect September 1, 2024 By: Mark A. Jones, Esq., Associate Senior Underwriting Counsel

In 2020 the SJC decided the case of In the Matter of Olchowski, 485 Mass. 807, which primarily involved the discussion of how to treat abandoned funds in IOLTA accounts. The decision has resulted in a new rule for IOLTA account reporting for financial institutions that will affect Massachusetts conveyancers.

In the Matter of Olchowski—

The case stemmed from a suspended attorney who was ordered to notify his clients that he was suspended from the practice of law and make all files available and refund fees not earned to his clients. Because he could not identify the owners of funds in his two IOLTA accounts, he filed a motion to give the unidentified funds to the IOLTA committee. The director of the unclaimed property division of the office of the Treasurer and Receiver General intervened and requested that the funds be remitted to the treasury as "abandoned property" under M.G.L. c. 200A. In the end, citing various reasons, the SJC determined that unidentified client funds do not fall within the statutory definition of "abandoned property" under M.G.L. c. 200A and that any abandoned funds in attorney IOLTA accounts should be transferred to the IOLTA committee for disposition.

2024 Amendment to the Rules of Professional Conduct –

In the past, financial institutions were required to report dishonored checks to the IOLTA Committee, and that requirement will continue with the 2024 amendment. But there will now be an additional reporting requirement by financial institutions and required action by lawyers for inactive IOLTA accounts (i.e., accounts with no withdrawals or deposits taking place other that automatic interest accruals):

After two and one-half years of inactivity in an IOLTA account, the financial institution is required to notify both the lawyer and, if known, the law firm at which the lawyer last practiced that the account has shown no activity for two and one-half years, and that the inactivity will be reported to the Board of Bar Overseers if it continues for six more months. **After three years of inactivity** in an IOLTA account, the financial institution is required to notify the BBO that the account is inactive, with copies to the lawyer and, if known, the law firm at which the lawyer last practiced while holding the account.

The new law also requires attorneys to close accounts after three years of inactivity and distribute the funds either to the owner of the funds or to the IOLTA committee, unless the account contains no unidentified or unclaimed funds, and the lawyer has a valid reason for keeping the account open. If the lawyer does not take action by either giving the BBO and the financial institution a valid reason for keeping the account open, or disbursing funds within a year from notification of inactivity, the financial institution is required to distribute the balance of the account to the IOLTA Committee and close the account.

You can read the updated Rules of Professional Conduct Rule 1.15: Safekeeping property taking effect September 1, 2024 here: Rules of Professional Conduct Rule 1.15

Industry Groups Battle Over Proposed Maine Deed Fraud Bill By: Zachary Greenfield, Esq., Maine Underwriting Counsel and State Manager

LD 2240 – An Act To Implement Protections Against Deed Fraud, recently introduced by Maine State Senator Henry Ingwersen with the intent of taking on the serious issue of deed fraud, has received both support and criticism from Maine real estate industry stakeholders. Of particular interest is Section 9 of the Bill, which proposes to amend the last paragraph of 33 MRSA §203 to read as follows:

Notwithstanding any of the requirements in this section, an instrument with an acknowledgment conforming to the requirements of the Revised Uniform Law on Notarial Acts must be accepted for recording purposes, except that any instrument affecting title to real property and recorded with a register of deeds pursuant to this section must be acknowledged before a person authorized to perform notarial acts in this State as described in Title 4, section 1910.

If enacted in its current form, Section 9 would prohibit the recording of deeds, mortgages, discharges, powers of attorney, and all other instruments affecting title to Maine real estate unless notarized by Maine notaries. This conflicts with Maine's recently enacted Revised Uniform Law on Notarial Acts, 4 MRSA § 1901, et seq., potentially the United States Constitution's Full Faith and Credit clause, and long-standing practices throughout the real estate and title industry in Maine and the country.

Those in support of the Bill tout its likelihood of reducing deed fraud, much of which appears to originate out of state. Those in opposition to the Bill argue that it is duplicative of existing criminal law that already prohibits deed fraud, places undue burdens on Maine's real estate professionals, and creates ineffective and unreasonable barriers to access to Maine's real estate market. Among those who submitted testimony in connection with the Bill are the following:

Support	Oppose
Maine Credit Union	Maine Assoc. of Realtors
CA League of Independent Notaries	Maine Real Estate Development Assoc.
	Maine Bankers Assoc.
	Maine Assoc. of Crim. Defense Lawyers
	Various Maine Attorneys
	Criminal Law Advisory Commission
	Notarize, Inc., d/b/a PROOF

The first legislative work session for the Bill occurred on March 11, 2024. We will continue to follow this Bill closely and keep you updated as it progresses through the legislative process. The Bill is available online at: (An Act to Implement Protections Against Deed Fraud).

Maine Supreme Judicial Court Overturns Controversial Foreclosure Precedent By: Zach Greenfield, Esq., Maine State Manager and Underwriting Counsel

Maine's judicial foreclosure statute, 14 MRSA § 6111, requires mortgage holders to send certain notices of default to delinquent borrowers before accelerating note balances and commencing mortgage foreclosure actions. In Pushard v. Bank of America, N.A., 2017 ME 230, Maine's Supreme Court applied the principal of res judicata (which prohibits parties from re-litigating issues already decided in a prior lawsuit between the same parties), to hold that a lender could not proceed with a second foreclosure action after losing the first due to an error in its default notice. As a result, the court determined that the note and mortgage were unenforceable, that the note could not be re-accelerated, and required transfer of title to the borrower, "free and clear of the mortgage encumbrance." Id. ¶ 36. Naturally, this decision sent shock waves through Maine's real estate lending community. Approximately seven years later, to the relief of lenders and foreclosure attorneys, Maine's Supreme Court has overturned this controversial precedent in its recent decision in Finch v. U.S. Bank, N.A., 2024 ME 2.

Like in Pushard, the foreclosure action against Finch resulted in a judgment in Finch's favor based upon the trial court's finding that the default notice was faulty. Relying on the precedent established in Pushard, the trial court declared that the note could not be re-accelerated, the mortgage was therefore unenforceable, the bank was required to discharge the same, and Finch held title free and clear of the mortgage. On appeal, the bank urged Maine's Supreme Court to overturn Pushard because, among other things, there is no legal justification for requiring a bank that lost a foreclosure action based upon a faulty default notice to discharge its mortgage even if res judicata prevents the bank from attempting to foreclose again.

In agreeing with the bank and overturning the "disproportional and draconian" result reached by the Pushard decision, Id. ¶ 5, the court held that because 14 MRSA § 6111 conditions note acceleration and mortgage foreclosure upon the issuance of a proper default notice, an improper default notice prevents the note from being accelerated. The

court further concluded that “when a lender lacks the right to accelerate the note, the note cannot be, and is not, accelerated anyhow by the commencement of a foreclosure action that the lender also lacks the right to commence.” Id. ¶ 6. As a result, a lender that loses a foreclosure action in Maine because of an error in its default notice and proceed with a subsequent foreclosure.

Meet Our Team | Stewart Connecticut

Meet Our Team | Stewart Maine

Meet Our Team | Stewart Massachusetts

Meet Our Team | Stewart New Hampshire

Meet Our Team | Stewart Rhode Island

Meet Our Team | Stewart Vermont

1-800-STEWART
www.stewart.com

® 2024 Stewart. All rights reserved.

This email was sent to your address because your email preferences are set to receive our updates.

unsubscribe