



**New England Regional Midweek Update**  
**3/15/2023**

Dear Stewart Partners,

We hope you've all recovered from the hour lost due to daylight savings time this past Sunday. This might be the last year we lose the hour as the Sunshine Protection Act has been re-introduced in Congress. Although the bill passed the Senate last year, it never made it to a vote in the House. We'll have to wait and see what happens in Congress this year.

In this week's update, we are including a summary of a recent article published by the Massachusetts Board of Bar Overseers that focused on disclosures and consents required when representing a client and acting as the issuing agent for title policies. In addition, we are highlighting municipal search reports that have become a regular part of practice in some areas of Connecticut for residential purchases. We are also including a short summary of Connecticut's recently promulgated statute affecting certain liens arising after the death of a real property owner. Additionally, in light of the recent bank failures, we've included a reminder about the "Good Funds" law.

Lastly, as you know, Stewart continues to provide you with up-to-date information on the 2021 policy forms. Note the registration link at the bottom of this Midweek Update for our Upcoming Webinar: "Policy Preparation".



**Title Insurance as a Law Related Service and Business Transactions –**  
**Massachusetts Rule of Professional Conduct 1.8 – Disclosure and**  
**Consent**

There has been a lot of buzz in the conveyancing community recently about the sale of title insurance constituting a business transaction, and the disclosure and consent process required under the Massachusetts Rules of Professional Conduct. The matter has become a hot topic since the release of a Massachusetts Board of Bar Overseers (BBO) article in December of 2022 and recently published in the BBO's newsletter. The article by Assistant Bar Counsel Robert M. Daniszewski is entitled "The Cost of Doing Business (With a Client)" and is available from the BBO website via this link [https://bbopublic.massbbo.org/web/f/cost\\_of\\_doing\\_business.pdf](https://bbopublic.massbbo.org/web/f/cost_of_doing_business.pdf). We strongly urge you to read the article in its entirety as there are many valuable tips included. For purposes of this update, we'll focus on some of the issues related directly to title insurance.

First, the article speaks to competing interests that can arise when an attorney enters a business or commercial transaction with a client resulting in the attorney and client

becoming “actually or potentially, opposing parties.” Some of the roles where the relationship can be problematic are when the attorney and the client are buyer and seller, borrower and lender, or joint venturers, and those roles can be blurred by overlapping or ancillary issues that call the attorney’s true role, that of the “disinterested protector” into question.

The article interprets Mass. R. Prof. C. 1.8(a) as prohibiting an attorney from entering into a business transaction with a client, unless:

1. The transaction and terms are objectively fair and reasonable and are fully disclosed in a writing that can be reasonably understood;
2. The client is advised in writing to seek the advice of independent counsel in regard to the transaction; and
3. The client gives written consent to the terms of the transaction, having been duly informed of the lawyer’s role in it, including whether the lawyer is purporting to represent the client in the transaction itself.

Based on this rule, the article states that “Massachusetts conveyancers must (a) disclose to the buyer the cost of the policy; (b) advise the clients of the desirability of seeking independent legal advice as to the purchase of the policy; (c) clearly inform the clients of the lawyer’s role in the sale of the policy (which presumably includes disclosure of the lawyer’s share of the policy commission); and (d) secure the clients’ written consent to the terms of the transaction.”

The article goes on to warn that providing this information and securing the buyer’s consent cannot be done “at or shortly before the closing” and that “[t]o do so invites discipline.”

So, what is the careful conveyancer to do? First, review your standard communication letter that is sent to a real estate buyer client. You may refer to it as a fee agreement or an introduction letter, but it needs to not only outline the scope of the representation and the fee for your services, it must also provide information as to the availability and cost of an owner’s policy of title insurance and advise the buyer that they may wish to obtain independent legal advice to assist them in determining whether to purchase a policy. Your letter should also be clear that you as the policy issuing agent will retain a portion of the title insurance commission, and the amount to be retained by you. The BBO article is not clear as to whether the exact dollar amount is required, or if inserting the percentage “split” you retain will be sufficient to comply with the rules. You’ll also want the buyer to acknowledge their consent to the terms of the transaction and confirm in writing that they do (or do not) wish to purchase the owner’s policy of title insurance.

The BBO article is silent as to what is required when the attorney for the lender is issuing an owner’s policy of title insurance, since the rules refer to business transactions with a “client.” As with many things, it’s likely that over-disclosure is the best course of action.

Fortunately, the BBO is available to help and offers their assistance through the BBO Ethical Helpline. The Helpline is available Mondays, Wednesdays, and Fridays from 2:00 to 4:00 p.m. The phone number is 617-728-8750.

If you want to review your current fee agreement, or you are just starting out and need some guidelines for your letters, the Law Office Management Assistance Program

(LOMAP) of Lawyers Concerned for Lawyers has forms in their Best Practice Guide. You can download a copy of the guide, with templates, here: <https://www.masslomap.org/fee-agreement-best-practice-guide-lawyers-templates>. Note that the forms in this guide do not address the issue of title insurance policies or the cost, and so you would want to add a specific section to address that.

Finally, since one of the matters required to be disclosed is the cost of the owner's policy of title insurance, we are providing a direct link to the Stewart Premium Calculator, you can find that at [Stewart Rate Calculator](#). Remember that if the buyer is getting a mortgage and you are issuing a loan policy at the same time as the owner's policy, the simultaneous issue rate applies. The buyer may also be eligible for a first-time homebuyer discount. For information on calculation of the premium and the first-time homebuyer discount, please see the Massachusetts Underwriting Bulletin MA2022001, here: <https://www.virtualunderwriter.com/en/bulletins/2022-1/ma2022001.html>

We hope you will find this article helpful and informative. Your success is important to us and we want to assist you whenever possible.



## **Connecticut's Municipal Search Reports**

When purchasing a home, it is always necessary to have a title search performed of the town land records to verify ownership, and to insure that any existing mortgages, liens or taxes are paid, so that you receive clear title. However, a title search is limited to a search of the land records and does not involve checking for building permits, certificates of occupancy or other building issues that are not part of the land records. In residential real estate transactions in Connecticut, buyers are increasingly checking the municipal department records regarding a property they are purchasing. The relevant municipal departments may include the building department, health department, fire marshal, planning, and zoning. These records may reveal significant information regarding a property, such as open permits (where a building permit was pulled, but no final inspection performed); unpermitted work (improvements made without obtaining required municipal permits); health violations such as a failed septic or well; or zoning issues such as notices of violation. It is always advisable to perform due diligence up front to minimize risk and potential costs to your client. A municipal search may spot potential issues early on in the process. A Municipal Lien Search will thoroughly investigate any violations, permits, building permits that have not been closed properly, unrecorded liens, unresolved code violations and under permitted structures that are likely to cause future problems that are associated with the property. However, a municipal search will not necessarily reflect violations of municipal regulations.

Some common issues that are reported from the various municipal offices include:

- Building Department – No Building Permit or Certificate of Occupancy for completed work, open permits (for example: Basement, Attics, Family Rooms, Bedrooms, Pools, Handicap Ramps)
- Zoning – Current use not in compliance with zoning (for example: use as multi-family in a single family zone)

- Health Department – Existing bedrooms exceed approved septic capacity or structures built over septic
- Fire Marshal – No UST (underground storage tank) removal report
- Inland/Wetland – Cease and Desist/Violations

Some of these common issues can be resolved through safe harbor statutory regulations under Connecticut law, including the following statutes:

CGS Sec. 29-265 (a) “... Nothing in the code or in this part shall require the removal, alteration or abandonment of, or prevent the continuance of the use and occupancy of, any single-family dwelling but within six years of the date of occupancy of such dwelling after substantial completion of construction of, alteration to or addition to such dwelling...”

CGS Sec. 29-265 (a) The “Six Year Letter”

- Applies only to single-family dwelling i.e., not for multi-family, pools, sheds or detached garages
- Exception for “safety of life or property”
- Town interpretations vary
- No municipal estoppel

CGS Sec. 29-265 (c) “... Nine years from the date of issuance of a building permit issued pursuant to section 29-263 for construction or alteration of a one-family dwelling, two-family dwelling or structure located on the same parcel as a one-family dwelling or two-family dwelling, for which construction or alteration a certificate of occupancy, as defined in the regulations adopted pursuant to section 29-252, has not been issued by the building official, such building permit shall be deemed closed...”

NEITHER the “Six Year Letter nor Nine Year” rules set forth in the above statute:

- Apply where there is no permit
- Apply to commercial property or multi-family (3+) dwellings
- Guarantee a home is built in compliance with building code
- Correct a defect that is not to code (i.e. Turn a 10” step into a 7” step)
- Bar health and safety actions by municipality
- Ameliorate liability concerns
- Guarantee acceptance by a future buyer

Violations of municipal land use regulations that do not appear on the land records do not affect the marketability of title, however the contract between the buyer and seller may place contractual requirements upon a party relative to compliance issues with municipal regulations. The failure to perform the due diligence in having a municipal search done and failing to address potential violations prior to closing may create future issues for the buyers after closing on their home. Municipal searches may be ordered through Stewart Title Guaranty Company the same way that full title searches are ordered.



## **Changes in Connecticut Succession Tax Law**

The Connecticut Succession Tax, Conn. Gen. Stat. Ch. 216, was replaced by the Connecticut Estate Tax, Ch. 217, effective January 1, 2005, without any modification of the infinite duration of the Succession Tax lien imposed upon real property owned by a decedent. Connecticut Standard of Title 23.1 has provided that title is not unmarketable if more than 25 years has passed since the death of a property owner even though neither the land records nor probate records evidence payment of or clearance of such tax. Section 3 of Public Act 22-136, now codified as Conn. Gen. Stat. Sec. 45a-113c, which became effective May 27, 2022, releases, among other things, the succession tax lien for all estates of decedents dying before January 1, 2005, except those estates where a return was filed under Sec. 12-359 or a tax was assessed under Sec. 12-367. As a result of such statutory changes, said Standard of Title is in the process of being amended. Should any question arise from a title affected by the succession tax lien or you need assistance in determining the status of the lien, contact a Connecticut underwriter for assistance.



### **Good Funds and Real Estate Closings**

We've all heard the news about the FDIC stepping in and closing Silicon Valley Bank and Signature Bank. Given the recent headlines, we want to remind you of both the so-called "good funds" statutes and the danger of wire fraud.

Every state in New England has a so-called "good funds" statute. While the parameters vary from state to state, the law basically requires mortgage lenders to make funds available to the borrower, the borrower's attorney or the lender's attorney prior to the mortgage being recorded. If you'd like to review the law applicable to each state, you can do so on Stewart's Virtual Underwriter site here:

<https://www.virtualunderwriter.com/en/real-estate-practices-by-practice/good-funds-requirements.html>

As is typical, we're certain that fraudsters are paying attention to the news and will use it to try to divert funds. Remember that any change in wiring instructions is always a red flag. If you are conducting a closing and you receive an email stating that wiring instructions for any payment have changed because of "new Federal Reserve requirements" or any other reason, you should be very cautious. Always remember to verify all wiring instructions by calling a known telephone number (and not the number used in the email providing the wiring instructions). The American Land Title Association (ALTA) website has numerous tools available to both members and non-members, including a checklist to verify outgoing wires. More information can be found here: <https://www.alta.org/business-tools/wirefraud.cfm>



### **Upcoming Policy Preparation Webinar – There's still time to Register**

Stewart is pleased to invite you to register for our second March webinar presented by our New England Underwriting Team. The webinar is open to all levels of title insurance professionals, so whether you're a seasoned pro or just starting out, you're sure to take away valuable insights and information that you can put into practice right away.

**Topic:** Policy Preparation

**Date:** March 23, 2023

**Time:** 10:00 a.m.

**Location:** Live online webinar. You will receive a "You're Registered" email from Microsoft Teams which will include a link to join the event.

**Register:** [Click here to register](#)

CLE credit is available for the above webinar in NH, CT, RI and VT. We are applying for approval in ME and will let our Maine registrants know as soon as it is received.



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