



New England Regional Midweek Update
3/29/2023

Dear Stewart Partners,

With baseball's opening day tomorrow and April right around the corner, we hope you are feeling encouraged that the warmer Spring weather will bring an increase in real estate sales, as it historically does, regardless of all the other factors that have been impacting the market lately. The first quarter of the year is almost behind us and as we move into the second quarter, please remember your Stewart team is always here for you and happy to help.

We hope you had a chance to watch our series of webinars on the 2021 owner and lender policies as well as commitment and policy preparation. If you did not have an opportunity to watch, we do have recordings available.

Contact your account representative or Jaime Tammaro – jaime.tammaro@stewart.com – for information on how to view these webinars.

In this week's midweek update we are sharing news about exciting legislation that has made it to the Massachusetts governor's desk. Although not yet passed, remote online notarization (RON), may soon become law in the state. We are also highlighting the importance of closing out home equity line of credit (HELOC) mortgages. Although this is not a new topic, it remains an important issue and one worth repeating. Lastly, we want to alert you to the latest trend in cybercrime, which is vacant land fraud. These scams are growing in number and involve fraudsters posing as property owners of vacant land who reach out to real estate agents to list properties they don't own.

As always, we hope you find this information helpful.



Proposed RON Legislation in Massachusetts Awaits Approval from Governor Healey

Both the House and the Senate passed Remote Online Notarization (RON) legislation, which is now awaiting Governor Healey's approval. The proposed legislation would create a framework which would allow for the use of RON by notaries in Massachusetts. Over 40 states have already enacted RON legislation, including several in New England. If signed into law, the Secretary of State would need to establish rules and identify authorized RON platform vendors to provide the technology to facilitate the remote online notarization. We will keep you apprised of developments as they occur.



HELOC Mortgages Must be Closed Out and Not Just Paid Off

As old as the topic might be, there is a long history of losses suffered by the title insurance industry for home equity lines of credit (HELOC) mortgages that were not paid off, closed out, and discharged. HELOCs are open-end mortgages that allow the borrower to draw and re-draw funds up to a certain amount. Unless a request to close the account is made, the account remains open. This differs considerably from a traditional mortgage. When a traditional mortgage is paid off, since the loan cannot be redrawn, the mortgage is automatically closed, and a discharge is customarily recorded.

Generally, but not always, upon receipt of a payoff request by the lender, the lender will freeze the line of credit to prevent future withdrawals. Some lenders, however, do not follow this practice, which is why it is important to obtain the most up-to-date payoff information as possible for closing. A borrower may not realize that the credit card or checks linked to the HELOC, relate to a mortgage that is recorded against their property, and therefore, may use the line of credit even after a payoff has been requested. In addition, when making the payoff of the HELOC as part of the closing, you must send the lender a signed letter of instruction from the borrower directing the lender to close the HELOC. Some lenders include an authorization form to close the HELOC with the payoff quote, but some do not. If the lender does not provide this form, the settlement agent must specifically ask the borrower to provide such a letter, so that it can be forwarded by you to the lender. If the payoff is made by wire, this letter must still be sent. We recommend that the settlement agent send this letter, along with a copy of the wire confirmation to the lender, in a manner which can be tracked. Remember, a prior HELOC mortgage retains priority over a subsequent mortgage even though the balance of the loan had been paid down to zero.

By including the signed direction from the borrower to close out the account, a lender will have clear instruction and will not misinterpret the remittance of funds as a pay down of the line of credit as opposed to a payoff. It's important to keep in mind that even if a borrower never used their HELOC, it is still a lien on the property. A payoff of the outstanding balance of the loan is not sufficient to close and discharge these mortgages, so unless a signed request from the borrower to close the HELOC is made to the existing lender, the account will remain open.

Recently, in *Todaro v. Wells Fargo Bank (In re Todaro)*, No. 19-23010-CMB (Bankr. W.D. Pa. Jan. 5, 2023), a Pennsylvania bankruptcy court ruled that a HELOC lender was not required to release its mortgage at the time of payoff of the loan balance because evidence that a letter signed by the borrower instructing the lender to close out the account was not delivered at the time the payoff was made. By leaving the line of credit open the borrower was able to draw an additional \$55,000.00 after paying down the original \$50,000.00 borrowed.

In this case, the Court agreed that a payoff letter itself provides some indirect evidence as to the nature of the request to which it was responding, but the Court did not believe it could be determined from the language of the payoff letter whether the request asked for a

payoff amount and explicitly directed that the line of credit was also to be terminated early or whether it just asked for a payoff amount without saying anything about an early termination. The Court also rejected the argument that the borrower's payment of a \$350.00 prepayment penalty indicated an agreement to close the line of credit.

There is an abundance of case law finding in favor of HELOC lenders when the court finds insufficient evidence to establish borrower's intent to terminate and close the line of credit.

As mentioned earlier, some borrowers don't understand that a HELOC is actually a mortgage or that a zero balance does not mean that the HELOC is closed. You may have asked a seller if there are any mortgages on the property and they have responded that there are not, but the title search revealed a HELOC. Sometimes the seller has never used the HELOC so they have no information about it. If there is no monthly payment due, the HELOC lender does not send a monthly statement, so it is possible to have never used a HELOC and never received a bill. Regardless, the account still needs to be closed and a discharge must be obtained and recorded.

Remember to always obtain a current payoff of the HELOC and follow the instructions carefully. Further, to mitigate risk from a draw against the line after the payoff is received, you should obtain an affidavit and indemnity from the borrower at closing, wherein the borrower certifies no further draws were made against the line after the payoff was provided and further indemnifies against loss if additional funds are due.

This affidavit is available on Virtual Underwriter and can be accessed here:

<https://www.virtualunderwriter.com/en/forms/2007-2/FM00000451.html>

Most importantly, you must also provide to the lender a signed authorization from the borrower instructing the lender to close out the account. In the Todaro case, the borrower filed a bankruptcy petition 10 years after the loan had been made so record keeping is important, and you should retain the letter as part of the closing file in case the request to close out a HELOC ever comes into question.

The following REQUIREMENT should be placed in any commitment when the title search discloses that the property is encumbered with a HELOC:

Mortgage from _____ to _____ recorded _____, securing a note in the original principal sum of \$_____, and other obligations described therein. This mortgage secures an equity line loan. Prior to the final payoff, the Company requires a satisfactory written statement from the beneficiary that the account has been closed or frozen and, if applicable, satisfactory documentation from the borrower to close or freeze the account and/or a satisfactory full release for review and for recording concurrent with the payoff.

Lastly, the only way you can be sure that the HELOC has been paid off and closed is if a discharge is recorded. It is important to track discharges in general, however, given the risks with a HELOC, tracking these discharges is critical. For our Massachusetts agents, if the HELOC mortgage is secured by a 1-4 family residential property, it is possible to discharge by affidavit pursuant to 183, §55(g)(1), if notice is given to the lender pursuant to requirements set forth in that section.

Stewart underwriting bulletins on the subject can be found on Virtual Underwriter at the following links:

Massachusetts bulletin:

<https://www.virtualunderwriter.com/en/bulletins/2015-120/ma2016001.html>

National bulletins:

<https://www.virtualunderwriter.com/en/bulletins/2008-9/BL122179952200000006.html>

<https://www.virtualunderwriter.com/en/bulletins/2005-9/BLMU000014.html>



Vacant Land Fraud

The U.S. Secret Service has seen a sharp increase across the country in reports of fraud involving vacant land. A common scheme playing out in the current real estate market involves scammers posing as owners of vacant land, wanting to sell quickly for cash at below market prices who then disappear without a trace. An unknowing buyer winds up with no land and the loss of a lot of money with little to no chance of recouping those funds. This can occur with both residential and commercial land.

The recent tactics the scammers have implemented begins with scammers researching local land records to find vacant land with no liens or encumbrances. Once they have identified the owner of the land, they pose as that owner and contact a realtor to list the property for sale. It is common that they will list the property at below market value for a quick sale and indicate a preference for a cash sale. They typically communicate only by email or text. They will arrange for their own notary signing of documents and claim to be in another state or another country. The purported notary is likely to be one of the fraudsters using the identity of an actual notary. They may even be signing by power of attorney and the attorney-in-fact is not local. At the time of closing, the closing attorney or title company transfers the proceeds to the scammer. The fraud is typically not discovered until after the sale has been consummated.

We've heard that these frauds are happening in New England. In one such incident that was shared with us, the seller claimed to be in South Africa and obtained the identity of a notarial officer in the embassy consulate and produced a deed that appeared to be officially notarized. The fraud, in this case, was discovered after the deed was accepted by the local recording office and funds disbursed. Although unconfirmed, we have reason to believe someone at the local recording office, handling the deed as part of the office's administrative tasks, recognized the name of the seller as a friend and contacted the true owner and asked if they had sold their property. This led to the discovery that true owner had no knowledge and had not put the property up for sale.

Another scammer claimed to be in California and was planning to sign the deed with a power of attorney. This was a near miss as the buyer had a question about a zoning issue and called the seller who knew nothing about the proposed sale.

The Rhode Island Association of Realtors recently published an article on this type of fraud. The article identifies several cases of vacant land fraud schemes attempted in Rhode Island and lists several actions a real estate broker or sales person can take to avoid becoming an unwitting facilitator in the schemes. To read the article, follow this link: <https://www.rirealtors.org/news/2023/02/13/news/beware-of-vacant-land-scams-in-rhode-island-updated-2-10-23/>

Here are some tips on how to prevent a loss from a vacant land scam:

1. Be on alert when your transaction is for vacant land.
2. Send an introductory letter to the seller at their address as it appears in the Tax Assessor's database, confirming that they are selling their property. Stewart Title has a template for a seller letter available in this bulletin by clicking the "form" link: <https://www.virtualunderwriter.com/en/bulletins/2022-4/sls2022004.html>
3. Independently do an online search for the identity of the seller.
4. Require the seller to show ID over a virtual meeting.
5. Verify the notarial officer in the state or country they are from and contact that officer to confirm they notarized the document in question and reviewed the seller's ID.
6. Subscribe to a service that can confirm wire instructions for your seller.
7. Pay attention to a feeling that all is not right with this transaction.
8. Make sure your staff is aware of this type of risk.

This list is not exhaustive, and awareness is key. Scammers are always looking for the next best way to part people from their money and this particular type of fraud is incredibly costly. In a challenging real estate environment, we are all at risk. Our diligence is the best tool for us to avoid this type of scam.

Stewart Title has a recent Bulletin regarding this topic that you should find helpful and, as always, please reach out to your local underwriter if you encounter any red flag or have questions.

<https://www.virtualunderwriter.com/en/bulletins/2023-1/sls2023003.html>



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