April 23, 2025

Dear Stewart Partners,

In this Mid-Week Update, we are providing a discussion of water rights in Massachusetts and a major real estate-related pitfall associated with rising bankruptcy filings in Maine. We are also republishing Stewart's recent bulletin on the renewed Geographic Targeting Order issued by FinCen last week, in case you missed it.

We hope this information proves useful and, as always, we are happy to answer any questions you may have on these topics.

Massachusetts Waterfront and the Colonial Ordinance of 1641-1647

By: Mark A Jones, Esq., Massachusetts and Rhode Island Associate Senior Underwriting Counsel

Last month I wrote an article on Chapter 91 Licenses and alluded to the Colonial Ordinance of 1641-1647. In this article I thought I would delve into the Ordinance in more detail. In Massachusetts, with some exceptions, the owner of waterfront property owns to the low water mark but no farther than 1,650 feet. This ownership, however, is subject to the rights of the public to pass over the shore for the purposes of fishing and fowling, to pass over the shore in boats and other vessels and to swim or float in tidal waters. These rights stem from the Colonial Ordinance of 1641-1647.

What is the Colonial Ordinance?

Below is the text. Note that the spelling errors are not typos but is the actual original wording.

> *Everie Inhabitant who is an hous-holder shall have free fishing and fowling, in any great Ponds, Bayes, Coves and Rivers, so far as the Sea ebbs and flows, within the precincts of the town where they dwell, unles the Free-men of the same town or the General Court have otherwise appropriated them. Provided that no town shall appropriate to any particular person or persons, any great Pond conteining more than ten acres of land: and that no man shall come upon anothers propertie without their leave otherwise as hereafter expressed; the which clearly to determin, it is declared, that in all creeks, coves and other places, about and upon Saltwater, where the Sea ebbs and flows, the Proprietor of the land adjoyning, shall have proprietie to the low water mark, where the Sea doth not ebb above a hundred Rods, and not more wheresoever it ebs farther. Provided that such proprietor shall*

not by this libertie have power to stop or hinder the passage of boats or other vessels in, or through any Sea, creeks, or coves, to other mens houses or lands. And for great Ponds lying in common though within the bounds of some town, it shall be free for any man to fish and fowl there, and may passé and repasse on foot through any mans propertie for that end, so they trespass not upon any mans corn or meadow. [1641-1647].

To reiterate in modern English, a landowner with waterfront property typically owns to the low watermark provided that the boundary of the legal description is the actual body of water as opposed to a lot on a plan with defined boundaries. But those ownership rights are subject to the rights of others to the high water mark. This is why it is possible to walk along the ocean beach in front of a privately owned waterfront residence, but you cannot, however, set up a beach chair, sunbathe and have a cool beverage.

For title insurance purposes if you are being asked to insure land that abuts the ocean you will want to take the following Schedule B exception in the title insurance policy:

--Rights of the public in [insert name of navigable waterway] for fishing, fowling, and navigation.

Additionally, depending on the type of body of water, there may be other exceptions that are appropriate and should be added to the policy of title insurance. Virtual Underwriter lists a number of possible exceptions that may be appropriate. To view these exceptions, simply access the exceptions directory of Virtual Underwriter under the Exceptions tab. For quick access, follow this link: Standard Exceptions. In this directory, you will find not only water exceptions (found under "W"), but an entire directory from A-Z of the ALTA standard exceptions for common and not so common matters that impact title.

As always, reach out to one of our underwriters if you have any questions. Also, mark your calendars for June 4, 2025 as I will be presenting a webinar on Waterfront Properties in Massachusetts and how to properly insure them.

Maine Bankruptcies on the Rise; Beware the Chapter 7 Trustee's Strongarm Power By: Zachary I. Greenfield, Esq., Maine State Counsel

New bankruptcy filings in Maine are on the rise. Chapter 7 cases, which are typically filed by consumers with little to no assets, more than tripled from 14 new cases in 2023, to 57 new cases in 2024. Chapter 13 cases, which are filed by wage-earning consumers seeking to reorganize, have increased 31% from 58 new cases in 2023, to 76 new cases in 2024. Finally, Chapter 11 cases, which involve business reorganizations, have tripled from 3 new cases in 2023 to 9 new cases in 2024. 2025 filings of all three case types are on track to exceed 2024.

The reasons for bankruptcy filings vary widely. Many consumer bankruptcies result from hardship caused by life events such as illness, divorce, and job loss. Chapter 11 business bankruptcies, however, tend to more closely follow economic factors. While the threat of

significant tariffs is expected to cause increased Chapter 11 filings in the coming months, the current leading cause of increased Chapter 11 filings is likely increased interest rates.

Like all loans, commercial real estate loans are priced with either a fixed interest rate, a variable interest rate, or a combination of the two. A typical commercial loan interest rate is fixed for the first five years at a market rate at loan origination and increases or decreases to a market rate in effect at the time of adjustment. Five years ago, typical commercial real estate loan interest rates for borrowers with good credit and sufficient collateral were often fixed for five years at roughly 4.00%. Now, five years later, many of those loans are adjusting to rates close to 8.00%. While an increase of 4.00% might not sound like a lot, consider the following example:

On January 1, 2020, Borrower, the owner of an apartment building, obtained a $2,000,000.00 commercial loan at the initial rate of 4.00% per annum fixed for the first five years of the loan, then adjusting to a prevailing rate, payable based on a twenty-year amortization. Borrower's monthly payments of principal and interest for the first five years were $12,119.61 each. However, on January 1, 2025, the rate adjusted to 8.00%, resulting in a new monthly payment amount of $16,728.80. That's an overnight increase of almost 40%. Unless Borrower can raise rents or cut expenses by that amount, the prospect of bankruptcy and/or foreclosure has increased significantly. This scenario, which also applies to consumer mortgage loans with variable interest rates, is responsible for many new bankruptcy filings.

When a debtor files bankruptcy, the automatic stay set forth in Section 362 of the Bankruptcy Code prohibits creditors from taking any collection or enforcement actions unless and until the stay is lifted, either by order of the Bankruptcy Court, or by operation of law upon the entry of a discharge and closing of the case. In Chapter 7 cases, substantially all of the debtor's assets are held in the bankruptcy estate, and the Bankruptcy Court appoints a Chapter 7 Trustee to administer the estate on behalf of all unsecured creditors. The Chapter 7 Trustee's compensation includes a percentage of the total value of assets administered by the Trustee. Assets that are fully encumbered by security interests including valid mortgages are not included in this amount. As such, the Chapter 7 Trustee has an incentive to find as many unencumbered assets as possible. In certain cases, this includes seeking to invalidate defective mortgages using a special provision of the Bankruptcy Code known as the "strongarm power." A ten-year-old Maine case, Hull v. Bishop 554 B.R. 558, provides an example of the strongarm power of which all real estate practitioners and title insurance agents should be aware.

Betty and Frank Bishop owned property in Houlton, Maine. On November 15, 2012, the Bishops executed and delivered to TD Bank, N.A. a $123,400.00 promissory note and a mortgage of the Houlton property to secure the note. The state and county in which the notary took the Bishops' acknowledgement were inadvertently left blank on the mortgage. On August 5, 2015, Betty Bishop filed Chapter 7 bankruptcy. The U.S. Bankruptcy Court for the District of Maine appointed Nathaniel Hull as Chapter 7 Trustee for the benefit of Betty's unsecured creditors. Hull detected the defect in the mortgage acknowledgement and filed an adversary proceeding seeking to void the mortgage, the result of which would be to convert the real estate into an unencumbered asset subject to claims of unsecured creditors.

According to Section 544(a)(3) of the Bankruptcy Code, a Chapter 7 Trustee acquires all rights and powers of "a bona fide purchaser of real property . . . from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists." U.S.C. § 544(a)(3). As such, the issue before the Bankruptcy Court was whether “a bona fide purchaser of the Property from the Bishops on the [date of filing bankruptcy would] have acquired an interest in the Property senior to the Mortgage.” To resolve that question, the court turned to Maine’s recording statute, which provides in part that “[n]o conveyance . . . is effectual against any person except the grantor, his heirs and devisees, and persons having actual notice thereof unless the deed . . . is acknowledged and recorded in the registry of deeds within the county where the land lies.” 33 M.R.S. § 201. Another section of Maine’s recording statute, 33 M.R.S. § 203, effectively requires that acknowledgements identify where they were taken.

Given that the acknowledgment did not include the name of the state in which it was taken, the court determined that the acknowledgment was fatally defective and that the Trustee, who technically took title to the property as a bona fide purchaser without notice of the purported defect, was not on notice of the mortgage and therefore acquired his interest in the property senior to that of the mortgagee. The mortgagee was therefore converted to an unsecured creditor. Presumably, the mortgagee’s title insurer was required to pay the loan policy loss.

On October 15, 2015, a now replaced version of Maine’s validation of defects statute, 38 M.R.S. § 352, became effective. According to that version, “[a] record of a deed [including a mortgage] . . . is valid and enforceable even if . . . the acknowledgment [w]as not completed.” 38 M.R.S. § 352 (1). But for the fact that Betty Bishop filed her bankruptcy petition on August 5, 2015, this statute would have prevented the arguably unjust outcome holding in Hull v. Bishop. The current version of the same statute validates defective acknowledgements, among other things, but only after they have been recorded in the registry of deeds for two years. As such, the risk of a bankruptcy trustee exercising the strongarm power to invalidate a mortgage based on an error or omission in its acknowledgment still exists, but for a limited period. Given the recent increase in bankruptcy filings, it therefore remains of paramount importance to pay close attention to even the smallest details of mortgages and other real estate-related instruments.

From a title insurance perspective, it is critical to confirm that all statutory prerequisites and formalities are met, given that even technical deficiencies can render mortgages and other instruments unenforceable, thereby triggering policy claims. This is true not only in Maine, but in all other states. Should you ever have questions about execution, acknowledgement, recording, or other formalities, please don’t hesitate to reach out to your Stewart Title Guaranty underwriter.

In Case You Missed It – Bulletin SLS2025004 –
US Department of Treasury: Financial Crimes Enforcement Network (FinCEN) Geographic Targeting Order

Last week, FinCEN renewed its Geographic Targeting Order which requires mandatory reporting of certain real estate purchases, where the purchases are made without a bank loan, and the purchaser is a legal entity, as defined by the order.

The GTO impacts purchases in both Massachusetts and Connecticut, if they the real estate is located in certain counties. For Massachusetts, the order impacts the following counties: Bristol, Essex, Middlesex, Plymouth, Norfolk, and Suffolk. For Connecticut, the order impacts property in Fairfield county and Litchfield county. If a party in the transaction fails to provide the necessary information for reporting purposes, a Stewart policy of title insurance may not issue.

The following requirement language should be included in Schedule B, Part 1 of all commitments issued for any property in a county where reporting is required:

This Company is required by Federal Law to collect certain additional information from you and the parties representing you regarding the purchase of real property. US Code Title 31-Sec 5326 authorizes the U.S Department of Treasury to collect information about the certain transaction as specified in various geographic targeting orders for the purpose of preventing evasion of the Bank Secrecy Act. As a result of a Geographic Targeting Order ("GTO") issued by the United States Department of Treasury, Financial Crimes Enforcement Network ("FinCEN"), on April 14, 2025, and effective April 15, 2025, this transaction may be responsive to the requirements of the GTO. You may be required, as a condition of the issuance of the policy to provide additional information that will be reported to FinCEN. Please contact this Company and provide the details of this transaction in order to comply with the GTO.

To read the complete bulletin, please follow this link: SLS2025004

As always, should you have any questions about this bulletin or the GTO, please contact your local underwriting counsel.

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