

Dear Stewart Partners,

We hope that all our friends in New England affected by the torrential rain over the past several days are continuing to recover. In this week's update, we begin a short series on vacant property fraud. This is an unfortunate growing trend and happening in our New England region. We'll be providing information about this trend over the next several weeks and we urge you to share this information with everyone on your staff, as well as your realtor partners.

On the education content front, we are highlighting two topics this week. The first is a primer on Non-Imputation endorsements and how they are used in commercial transactions, and second, is a brief summary and refresher on Deeds in Lieu of Foreclosure. We hope you find this useful.

Lastly, as a reminder, please see the information at the end of this update about an upcoming Continuing Legal Education seminar on Massachusetts Horticultural and Recreational Liens presented by Stewart's own Christine Provost and Rhonda Duddy.



Vacant Property Fraud – A Growing Trend

It is important to be aware of real estate fraud trends and to remain vigilant when handling any real estate closing to avoid being used in the facilitation of a real estate scam. Several months back, Stewart issued Bulletin SLS2023003 alerting agents to the increase of fraudulent land sales. ALTA has also issued an advisory on the same topic. This isn't a scam that is isolated to any particular region and real estate everywhere is a potential target.

Although the precise steps of the scam can vary, generally the transaction follows the following pattern:

- The scammer will search the public records to identify real estate that is free of a mortgage or other liens. These often include vacant lots or rental properties. The identity of the landowner is also obtained through this public records search.
- Posing as the property owner, the scammer contacts a realtor to list the property for sale. All communications are through email and digital means, and not in person.
- The listing price of the property is typically below current market value, which generates immediate interest in the property.
- The scammer quickly accepts the offer, with preference for cash sales.

- At the time of closing, the scammer refuses to sign documents in person and instead provides signed documents by mail or other delivery service.
- If the fraud is not detected, the title company or closing attorney transfers the closing proceeds to the scammer.

There are steps that can be taken as part of the closing process due diligence that would help detect and mitigate the potential fraud. When a transaction has red-flags or feels suspect, independent research should be conducted, such as:

- Independently search for the identity and a recent picture of the seller.
- Request an in-person or virtual meeting to see their government issued identification.
- Be on alert with a seller accepting an offer price below market value in exchange for the buyer paying cash and closing quickly.
- Never allow a seller to arrange for the execution of documents with a notary. Use a trusted title company or closing attorney to coordinate the exchange of closing documents and funds.
- Send a confirmation Letter to the seller by regular mail to the address on file with the Town/County tax assessor. Stewart has prepared a form template letter for this purpose. The form template is accessible as a link through Stewart Bulletin SLS2022004: <https://www.virtualunderwriter.com/en/bulletins/2022-4/sls2022004.html>
- Verify wire instructions from secondary and reliable sources.

Stewart's bulletin contains a number of red flags to help you identify suspicious transactions. To read the bulletin, follow this link:

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



Real Estate Investors and Non-Imputation Endorsements

Stewart Title Guaranty Company is often involved in real estate development transactions where a portion of the financing comes from equity investors. The equity investors have ownership in the entity that owns the real property, perhaps as members of a limited liability company owner or limited partners of a limited partnership owner.

From a title insurance perspective, in the event of a transfer of ownership interest in an entity, the knowledge of one party may be imputed or assigned to the transferee since an owner's title insurance policy jacket excludes several items from coverage including damage or loss arising from defects, liens, encumbrances, adverse claims or other matters:

- "created, suffered, assumed or agreed to by the insured claimant" Exclusion 3(a);
- "not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy" Exclusion 3(b); or

- "resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy" Exclusion 3(e)

By way of example, an investor entity that purchases all the membership interests in a limited liability company could be bound by the acts or knowledge of the prior owner of the membership interests. As a result, the title company may be able to deny liability on the basis that the matter at issue was known to the insured and not known to the title company and not disclosed by public records. This possible result is very troubling to an equity investor who is joining an existing real estate project.

In order to address the imputation issue that may arise in an equity transfer transaction, ALTA 15 series endorsements, which are "non-imputation" endorsements, can be issued with an owner's policy, when the Company's underwriting requirements are met. Pursuant to these endorsements, the title company agrees that the aforementioned exclusions will not apply with respect to a covered matter by reason of action, inaction, or knowledge, at Date of Policy, of other or former stockholders, officers, directors, managers, partners or members (of an LLC) of the insured, provided that the "incoming" partner, member or stockholder acquired its interest as a purchaser for value without knowledge of the matter otherwise insured against. In other words, these endorsements are designed to provide protection from matters that would otherwise be excluded from coverage on the basis of imputed knowledge by removing such imputed knowledge as the basis for limiting coverage under preprinted Exclusion 3(a), (b), and (e).

There are three endorsements in the ALTA 15 series. The ALTA 15 (Full Equity Transfer) is used when the entire beneficial interest of the record owner/named insured on the owner's policy has been transferred for value and is issued with a new owner's policy naming the incoming investor as the insured. The ALTA 15.2 (Partial Equity Transfer) contemplates acquisition of a partial ownership interest in the existing record owner and is also issued with a new owner's policy naming the incoming investor as the insured. The ALTA 15.1 (Additional Insured) contemplates the acquisition of a portion of the beneficial interest of title record owner/named insured and adds the incoming investor as an "Additional Insured". One important thing to note about the ALTA 15.1 is that it does not down-date the existing owner's policy. Consequently, in order for the incoming investor ("Additional Insured") to be protected as of date of issuance of the endorsement as to matters known or created by the other parties, the incoming investor should require a new policy or a downdate of the existing policy.

There are several underwriting requirements to be satisfied in connection with the issuance of the ALTA 15 series endorsements. For example, we require execution of the [ALTA Nonimputation Affidavit 1](#) by those persons whose knowledge, action or inaction is covered by the endorsement. This affidavit includes representations that such parties have not done anything to create any defect, lien, encumbrance, transfer of interest, constructive trust, other equity in, or other matter affecting the land not disclosed in the title commitment and have no knowledge of any such adverse interests not disclosed in the title commitment.

To learn more about the ALTA 15 series endorsements which are available from Stewart Title Guaranty Company, you can review the issuing guidelines and endorsement forms on

Virtual Underwriter, by following the links below or contacting your Stewart Underwriting Counsel:

[Guideline: ALTA Endorsement 15 and 15-06 \(Nonimputation-Full Equity Transfer\) \(virtualunderwriter.com\)](#)

[Guideline: ALTA Endorsement 15.1 and 15.1-06 \(Nonimputation-Additional Insured\) \(virtualunderwriter.com\)](#)

[ALTA Endorsement 15.2-06 \(Nonimputation-Partial Equity Transfer\) \(virtualunderwriter.com\)](#)



Deeds in Lieu of Foreclosure

While mortgage default rates are low these days, it may be helpful to brush up on underwriting requirements for Deeds in Lieu of Foreclosure (DIL), both for the purposes of issuing owners' policies for the grantee in a DIL and/or for review of a DIL in the chain of title. The requirements we look for in a DIL are the same in either case and are as follows:

The DIL must not be given as additional security for a debt and the grantor must not be acting under duress. The DIL must not have conditional language (e.g. repurchase, rescission) in it. The grantor must vacate the property and surrender possession to the grantee/mortgagee. All pending foreclosure proceedings, if any, must be dismissed. The grantor/mortgagor and all guarantors, if any, must be released from personal liability on the underlying debt. In most instances, the mortgage must be released of record, or it must remain as an exception on the policy. The DIL must be properly executed and acknowledged. The grantor must also execute a Deed in Lieu of Foreclosure and Affidavit and Estoppel Certificate (Affidavit), which has its own requirements.

The contents of the Affidavit include statements that: the deed is intended to be an absolute conveyance and conveys the property without any conditions; the grantor has vacated the premises; there are no mechanics liens that could be asserted against the property and the deed was not given as a fraudulent or preferential transfer; and the grantor is not insolvent and there are no other liens on the property. The Affidavit must also state that the consideration for the deed is the full release of all liabilities of the grantor secured by the mortgage and that the grantor's outstanding debt equaled or exceeded the fair market value of the premises. It is not uncommon to run across DILs of record that are missing an Affidavit and often, the mortgage has not been discharged.

If you are issuing a policy to the grantee of a DIL, the search period will be the same as that for as standard owner's policy required in your state. It's important to be sure there are no other liens since they would not be extinguished by the DIL and must be taken as an exception on the policy. The grantor must be searched for open bankruptcy filings to be sure the DIL cannot be considered a preferential or fraudulent transfer.

For a DIL on title within the last 90 days of your transaction, consult with your underwriter to determine if there are other requirements.

To review all general requirements for insuring DILs, please review our Underwriting Manual on Virtual Underwriter, by following the link below. As a reminder, each state may have its own specific legal and underwriting requirements and we recommend you reach out to your state underwriter if you have any questions.

https://www.virtualunderwriter.com/en/underwriting-manuals/2014-2/UM00000002.html#SubTopics_2

For a sample Deed in Lieu of Foreclosure and Affidavit and Estoppel Certificate, follow this link:

<https://www.virtualunderwriter.com/en/forms/2010-4/FM00000569.html>



REBA to Host a Webinar featuring Christine Provost and Rhonda Duddy of the Massachusetts Underwriting Team

Topic: Massachusetts Horticultural and Recreational Liens under GL. 61, 61A & 61B.

Christine and Rhonda will be discussing Forest, Recreational, and Agricultural and Horticultural lands, otherwise known as Chapter Lands. Join the discussion for a review of M.G.L. chapters 61, 61A and 61B with a focus on how to clear title for a purchase or sale, or for a withdrawal from Chapter. The discussion will include how to deal with rights of first refusal and particular notice requirements.

Date/Time: August 16, 2023 (Wednesday) from 12:00 – 1:00PM

Registration: Open to all REBA members. To Register please email Matt Zarrella at REBA – zarrella@reba.net



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