



Dear Stewart Partners,

It's hard to believe that we are in the last full week of August and September begins next week. We hope all of you had a chance to enjoy some summer vacations with friends and family. In this week's update we are moving on from our focus on vacant property fraud, but letting you know about a new scheme involving fraudulent cashier's checks purportedly issued by Fifth Third Bank.

We are also including information about some recent developments from Fannie Mae and its title insurance waiver pilot program. In addition, we are providing you with a summary of a recently decided Massachusetts Land Court case involving a Right of First Refusal, along with some reminders on the statutes of limitations in other states relating to the same.



Fraudulent Cashier's Checks from Fifth Third Bank

Yesterday Stewart issued Bulletin SA2023186, notifying agents of fraudulent cashier's checks purporting to be issued by Fifth Third Bank. If you are handling a closing and any of the funds are given to you in the form of a cashier's check drawn on Fifth Third Bank, you will want to confirm the check is legitimate by contacting Fifth Third Bank directly and following the procedures in the Bulletin. According to the Bank's website, they do not have any physical branches in the New England area, and so hopefully this will have a minimal impact on your practice.

To read the Bulletin on Virtual Underwriter, click here:

<https://www.virtualunderwriter.com/en/bulletins/2023-8/sa2023186.html>



Fannie Mae's Title Insurance Waiver Pilot Program Halted

Earlier this year, Fannie Mae was reportedly considering a pilot program that allowed certain mortgage lenders a waiver on title insurance requirements for loans sold to Fannie Mae. The pilot program derived from Fannie Mae's Equitable Housing Finance Plan, which

seeks to “advance greater equity in America’s housing finance system, its practices, and its outcomes.” As part of this plan, Fannie Mae has targeted a reduction in closing costs, including “title insurance cost reduction.” This news was on the heels of Fannie Mae’s announcement in April 2022 that it would accept Attorney Opinion Letters (AOLs) in lieu of traditional title insurance for certain loans (which program is still in place).

However, very recently ALTA confirmed that Fannie Mae is no longer pursuing the title waiver pilot program and it will not be submitted to the Federal Housing Finance Agency (FHFA) for review or consideration.

Understandably, ALTA and other members of the title insurance industry voiced significant concern about the pilot program and its possible ramifications. After all, title insurance, which is a highly regulated product, protects both lenders and homeowners against financial loss and potential loss of property from unknown problems. According to an email from Diane Tomb, the CEO of ALTA, more than 200 ALTA members voiced their concerns about the pilot program with members of Congress.

Fannie Mae’s decision to no longer pursue the pilot program is a significant win for consumers, lenders, the title industry and the housing finance system in general. Tomb also wrote in the email that ALTA “will continue to work with the FHFA and policymakers to thoughtfully address housing affordability and opportunity.” To read a recent article on this topic, follow this link to Housing Wire’s recent report: [Fannie Mae scraps title waiver pilot program - HousingWire](#)



Massachusetts Land Court Decision – Tucker v. Adams, et al. (22 MISC 000185)

In this recently decided case out of the Massachusetts Land Court, the Court evaluated whether a right of first refusal that was granted as part of a settlement agreement, and which limited the purchase price to a set amount and was silent as to its duration, was void and unenforceable as an unlawful restraint on the alienation of property or because it lacked consideration. The facts of this case are not complicated. The plaintiff, Nancy Tucker (“Tucker”) placed her home on Cape Cod for sale in September 2019 with a real estate broker. The defendants, Nancy Adams and Salvatore Renda (collectively “Adams” or “Buyers”), made an offer to purchase the property and Tucker accepted the offer. The purchase and sale agreement contained all the typical terms, set the purchase price as \$465,000.00, and called for a closing date in November. In addition, the parties executed a separate agreement to purchase much of the personal property in the home.

After executing the purchase and sale agreement, but before the closing date, Tucker requested that the closing date be moved one month due to health issues and upon the recommendation of her medical providers that she not move. Later that same month, Tucker, through counsel, informed Adams that she could not go through with the closing due to medical issues and requested a cancellation of the contract. After Tucker’s counsel sent the request to cancel the contract, Tucker - on her own - sent an email to Adams indicating she did really want to sell and asking whether the Buyers could offer some flexibility. Tucker indicated she just needed further medical evaluation, a treatment, and a doctor’s release. She ended her email emphasizing she really wanted to sell. Thereafter,

the closing date was extended to December 13, 2019. At the end of November, Tucker sent an email to her counsel and the Buyers stating that she could not close on December 13, 2019 due to medical and other obligations. She suggested closing dates in the Spring 2020. The Buyers responded several days later stating they were not extending further and that Tucker needed to be prepared to close no later than January 13, 2020. The Buyers further alerted Tucker that they intended to file a complaint for specific performance and seek a lis pendens.

Thereafter, negotiations ensued in an effort to avoid litigation, and the parties reached an agreement whereby the deposit was returned to the Buyers, Tucker paid the Buyers \$1,500.00 to offset the expenses incurred, and Tucker granted the Buyers a right of first refusal, which stated in pertinent part:

“In further consideration of [the] Mutual Release executed by the parties this date, Nancy P. Tucker, Seller, and Salvatore Renda and Nancy Adams, Buyers, hereby agree that if in the future Seller, or her Estate, were to wish to sell this property, Buyers shall have the right of first refusal to purchase the property at the same price and on the same terms, including as the purchase of contents and furnishings, set forth in a certain Purchase Sale Agreement dated September 22 [sic], 2019 regarding 313 Carriage Shop Road, E. Falmouth, MA 02536.

Should the Buyers wish to exercise the Right of First Refusal, they shall so indicate within 10 business days of receipt of notice to them, notice to be given by e-mail or first class mail assuming Seller has up-to-date contact information. Thereafter, a new purchase & sale agreement shall be executed, allowing for the usual deposit requirements and contingencies for financing and other matters that may be required. . . . “

Ten months after the agreement was signed, Tucker contacted Adams and stated she had no recollection of the agreement and didn't remember signing it. She also stated that it wasn't until now that she received the executed agreement. She informed Adams that she was not coherent at the time she signed the agreement and would have insisted on a deadline in which the right of first refusal could be acted upon. She also stated no judge would uphold the right of first refusal as written. She then offered what she termed a non-negotiable proposal for the sale of the home, with terms that did not align with the right of first refusal in that the demanded purchase price was significantly higher, plus she was seeking additional money for the upgrades she had since made to the home. The Buyers rejected this offer.

Tucker placed the home back on the market in February 2022. Although the right of first refusal was not listed in the MLS listing originally, it was added after the agreement was brought to the Realtor's attention. On February 21, 2022, Tucker accepted an offer to purchase the property for \$825,000.00. Tucker provided a copy to Adams, asking that they match the terms, but they declined. Tucker then commenced this action for the declaratory judgment relative to the right of first refusal.

The sole issue at trial was whether the agreement was invalid, either as an unlawful restraint on alienation or because it lacked consideration. As to the consideration issue, the Court quickly analyzed and disposed of the question of whether there was

consideration given for the agreement. It held that the Buyers' foregoing their threatened litigation was sufficient consideration.

As to whether the right of first refusal was an unreasonable restraint on alienation, the Court looked to the factors set forth in the Restatement (First) of Property. The Court found that at least three factors would support the conclusion that the right of first refusal in this case was an unreasonable restraint on alienation. Specifically, the agreement contained no time limit, the price was fixed, and the class of people to whom alienation is prohibited was large. However, the Court found there were other factors that tended to support a conclusion that under the circumstances, the agreement wasn't unreasonable. The Court pointed to the fact that Tucker had avoided litigation and was able to retain the property for some time. Given the health benefits to Tucker and other issues facing her at the time, the avoidance of litigation and a delay in closing were of substantial benefit to her. The Court also found that the agreement was not imposed for spite or malice, but rather was instead an inducement for Adams to terminate the purchase contract with Tucker. The Court also found there was beneficial public purpose in the agreement, in that it encouraged the settling of a dispute. The Court went on to say that although there was no stated time limit in the agreement, "it is plain that the parties considered Ms. Tucker's health to be a limited time factor." The court also made note of the defendant's testimony that she believed the agreement had a time limit of 6 to 12 months, and the fact that Tucker first offered to sell the property to Adams a mere 10 months after the agreement was signed.

Given all these facts, the Court held the right of first refusal was not an unreasonable restraint on the alienation of property. The fate of the right of first refusal, however, did not end there, as the Court held that the agreement was no longer enforceable because of the passage of time. The right of first refusal was first triggered in October 2022, when Tucker reached out and made the offer to sell. Although it was on different terms, the Buyers at that time could have insisted on their rights under the agreement but did not do so. The Court highlighted the fact that the Buyers also did not act the second time Tucker notified them of her intention to sell in February 2022, and notably did not bring a counterclaim in the present action to assert their rights under the agreement. The Court refrained from determining when the agreement became unenforceable, but concluded that at this point in time, it is unenforceable.

It is clear from the court's decision and analysis that the determination of whether any reserved right relative to real property is an unreasonable restraint is highly fact dependent. The case is also a reminder that in order to preserve a preemptive right, the holder must act promptly. In Massachusetts a preemptive right (created after 6/30/1990), such as a right of first refusal is limited to a period of thirty years, under G.L. 184, section 27; however, as seen in this case, the right can expire prior to that time based on the language and the obligations of the parties. To read the full decision, follow this link:

[Tucker v. Adams, et al. \(22 MISC 000185\)](#)



Determining whether a matter impacts title to real property is the core of the work real estate conveyancers and title policy issuing agents do every day. Our underwriters at Stewart have put together quick reference guides to Common Statutes of Limitations affecting real estate in the various New England states. These reference charts provide a quick, one stop reference. To download, follow the links below:

[Connecticut Statute of Limitations Chart](#)

[Maine Statute of Limitations Chart](#)

[Massachusetts Statute of Limitations Chart](#)

[New Hampshire Statute of Limitations Chart](#)

[Rhode Island Statute of Limitations Chart](#)



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