

Dear Stewart Partners,

This coming weekend marks the unofficial start to Summer, and we want to wish all of you a happy Memorial Day. We hope you are able to take some time to relax and enjoy time with friends and family.

In this week's update, we're reminding you that fraudsters are also looking forward to the long weekend, so that they can try to scam you out of money. We are also providing a review of a recent Massachusetts Land Court case, *Cyr v. Smith*, which deals with rights of first refusal.

Finally, the REBA Women's Networking Group annual fundraiser is a little over two weeks away, and if you haven't purchased tickets yet, time is running out. Stewart is a proud sponsor of this event, and so we hope you can join us. Please see below for more information.



Long Weekend or Fraud Weekend?

Our underwriting team recently had a meeting with the claims group here at Stewart, who assured us that wire fraud is still alive and well across the country. While we all think it can't happen here, it does, and it will (and unfortunately has!). We know long weekends are particularly dangerous since the fraudsters have an extra day to abscond with the funds.

Please remember that any change in wiring instructions is a red flag, and never wire funds without verifying wiring instructions using a known telephone number or a verification service such as CertifID.

Any payoff letter that does not also contain a mailing address is also a red flag, and if the wire instructions are to an account name that does not match the name of the lender, be highly suspicious.

Finally, please make sure your office has put in place the ALTA Rapid Response Plan, and everyone knows where to quickly locate a copy. This document can be a lifesaver if you find you've become a victim of wire fraud. For more information, you can go to: <https://www.alta.org/news-and-publications/news/20180821-Download-ALTAs-Rapid-Response-Plan-for-Wire-Fraud-Incidents>. You do not need to be an ALTA member, and the sooner you complete the worksheet and provide it to your employees, the better. No one wants you to be at a Memorial Day cookout worrying about wire fraud!



Rights of First Refusal by: Rhonda Duddy, Esq., Massachusetts and New Hampshire Underwriting Counsel

A right of first refusal is a contractual right that gives a party the opportunity to meet the terms of a third party's offer. In Massachusetts this right can apply to various real estate transactions. A right of first refusal can sometimes be found in contracts such as purchase and sale agreements, lease agreements, condominium association trusts, or municipal liens assessed under Chapter 61, 61A or 61B.

Disputes over rights of first refusal are not uncommon and can arise due to ambiguities in the terms of the agreement, disagreements over valuation or alleged breaches of contract, as was recently the case in Cyr v. Smith, Massachusetts Land Court, Docket No. 21 MISC 000410. The parties to the action are Pamela Cyr, Joyce Holupka (Cyr) and Katherine Smith (Smith) who started out as friends but ended up in litigation.

After Cyr's careful search for a buyer for the oceanfront house next door to their home, they decided to sell to Smith. Contemporaneously with signing the purchase and sale agreement, the parties entered into a "side agreement." The side agreement provided that Cyr had a right to repurchase the property under two different scenarios. The first paragraph of the side agreement stated that if Smith decided to sell the property within 4 years, she would inform Cyr 30 days before actively marketing the property and then Cyr would have the right to buy at 1% compound annual growth rate (CAGR) with a starting cost of \$2.5 million. The second paragraph of the side agreement stated that if Smith decided to sell the house after that time, Cyr still had the right to buy it back at a 1% CAGR with a \$2.5 million starting cost, or they could buy it for 5% below the highest offer received from a third party, whichever was lower.

Three years after purchasing, Smith told Cyr she was considering selling the home, which initiated multiple communications between the parties. In an email Cyr told Smith they would buy the home for \$2.8 million or if Smith decided to list the home, for the best offer received minus 5 percent. Smith responded by thanking them for their "offer of \$2.8 million" but stated that the market value was significantly more and she planned to list it instead would add Cyr to the exclusion list. Later, Smith changed her mind and decided not to list the property for sale.

Cyr eventually filed suit seeking specific performance, requiring Smith to sell her property back to them based on actions and conversations which they claim triggered Smith's obligation to sell the property to them. Cyr argued that paragraph 1 of the side agreement gave them a unilateral right to repurchase the property once Smith informed them that she intended to list her property for sale, even though Smith later decided not to sell the property— in other words, Cyr's rights were in the nature of an option to purchase, not merely a right of first refusal. Smith contended that the side agreement was intended by both parties to be a right of first refusal and not an option contract and regardless, the communications of the parties released her from any obligation to sell her property to Cyr, especially since she changed her mind and decided she did not want to sell.

The judge discussed the differences between options and rights of first refusal. An option “creates a unilateral right in the holder ... to compel performance exclusively for his or her benefit” and as such the language is strictly construed. On the other hand, a right of first refusal is a limitation on the owner’s right to sell, and does not come into effect until a decision to sell is made.

In this case, the judge held that paragraph 1 of the side agreement was a “right of first offer” requiring Smith to first offer to sell the property to Cyr prior to putting it on the market. However, the judge also found that the multiple communications between the parties ultimately modified paragraph 1 of the side agreement, clearing Smith of any obligation to sell to Cyr. The judge concluded, “Had the parties intended such an irreversible relinquishment of Smith’s property rights triggered only by a ‘decision’ to market the property that was never carried out, one would expect some language in the side agreement that forewarned Smith of the gravity of simply informing Cyr that she wanted to sell her property. The absence of language that addresses the parties’ rights in the event that Smith changed her mind about selling suggests that the topic was not discussed and, therefore, there was no meeting of the minds on this specific question.” The court also noted that the parties do remain bound by the terms of paragraph 2 of the side agreement, which would impact Smith’s future sale of the property.

As you can see from this case, rights of first refusal can have serious repercussions that could lead to years of litigation and unfriendly neighbors. Remember that rights of first refusal can also impact your title and are sometimes hard to spot in the chain. If you find an existing right of first refusal on record and a release and/or waiver is not recorded, please contact your Stewart underwriter for guidance on what would be required to issue a policy of title insurance.



REBA Women's Networking Section Annual Fundraiser – JUNE 6, 2024

We hope you are able to join us at the Women’s Lunch Place in Boston the evening of June 6, 2024 for the Women’s Networking Section’s 10th Annual Fundraising Event. This year’s theme is “Trivia Trattoria” and will feature Italian-inspired dinner and desserts, alcoholic and non-alcoholic beverages, raffles and 6 rounds of trivia. Stewart is proud to be a “Prosecco Sponsor” of this event. For more information, see the Women’s Lunch Place website here: <https://womenslunchplace.org/reba>

If you are not familiar with the work of the Women’s Lunch Place, you can read more on their website, or listen to a recent interview with Jennifer Hanlon Wigon, their Executive Director, on WGBH: <https://www.wgbh.org/news/local/2024-05-10/women-facing-homelessness-need-specialized-care-nonprofit-leaders-say>.



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