



**First American Title™**  
NATIONAL COMMERCIAL SERVICES

# Current Developments

By *Michael J. Berey*  
Senior Underwriting Counsel  
First American Title  
National Commercial Services



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# Current Developments

## Cybersecurity

New York State's Department of Financial Services has issued 23 NYCRR 500, "Cybersecurity Requirements for Financial Services Companies", requiring that "[e]ach Covered Entity shall maintain a cybersecurity program designed to protect the confidentiality, integrity and availability of the Covered Entity's Information Systems" and setting forth requirements for such programs. A Covered Entity is "any Person operating under or required to operate under a license, registration, charter, certificate, permit, accreditation or similar authorization under the Banking Law, the Insurance Law or the Financial Services Law". Part 500 of 23 NYCRR is posted at <http://www.dfs.ny.gov/legal/regulations/adoptions/dfsrf500txt.pdf>.

## Financial Crimes Enforcement Network ("FinCEN")

As reported in Current Developments, on January 13, 2016 FinCEN issued Geographic Targeting Orders ("GTOs") requiring "certain U.S. title insurance companies to identify the natural persons behind companies used to pay 'all cash' for high-end residential real estate in the Borough of Manhattan in New York City, New York, and Miami-Dade County Florida". On July 22, 2016, FinCEN issued an Order extending the requirements to include real estate in Bexar County, Texas, Broward and Palm Beach Counties in Florida, The Boroughs of Brooklyn, Queens, the Bronx and Staten Island in New York City, and Los Angeles, San Diego, San Francisco, San Mateo and Santa Clara Counties in California. The GTOs, as previously extended, would have expired on February 23, 2017. FinCEN has extended the requirements for one hundred eighty days beginning February 24. FinCEN's news release is posted at <https://www.fincen.gov/news/news-releases/fincen-renews-real-estate-geographic-targeting-orders-identify-high-end-cash>.

## Land Under Water/Zoning

Section 42-55 of the Zoning Resolution of the City of New York regulates the placement of signs, including advertising signs, near designated arterial highways. Subsection (d) permits, in certain cases, signs to be located along designated arterial highways "within one-half mile of any boundary of the City of New York". The Buildings Department reversed its prior approval of a permit for the placement of an outdoor advertising sign. The Board of Standards and Appeals denied the Petitioner's appeal of that determination, An Action commenced under CPLR Article 78 ("Proceeding against body or officer") was dismissed by the Supreme Court, New York County. The Appellate Division, First Department, affirmed the lower court's ruling, holding that the Board of Standards and Appeals of the City of New York "rationally determined that the United States Bulkhead Line running along the Bronx shoreline of the Harlem River does not constitute a 'boundary of the City of New York' within the meaning of New York City Zoning Resolution Section 42-55(d)..." Matter of Take Two Outdoor Media LLC v. Board of Standards and Appeals of the City of New York, 2017 NY Slip Op 00593, decided January 31, 2017, is reported at 146 AD3d 715 and is posted at [http://www.nycourts.gov/reporter/3dseries/2017/2017\\_00593.htm](http://www.nycourts.gov/reporter/3dseries/2017/2017_00593.htm).

## Legal Opinions

Borrower's counsel's legal opinion, addressed to the lender, stated that "[t]he execution and delivery of the Loan Documents, to my knowledge, after due inquiry, will not violate, conflict with, result in the breach of or constitute a default under any contract, [or] agreement" to which the borrower or the guarantor is a party. However, when the borrower previously purchased the property its principal executed a letter agreement conditioning the right to refinance the property on there being "unencumbered equity" of \$2,000,000. Although it was represented to the lender that the price paid by the borrower for the property in 2005 was \$6,900,000, the price paid to the seller was \$1,900,000 in cash and \$5,000,000 preferred equity in the borrower. The actual value of the property was \$1,900,000; the loan to the borrower was \$6,600,000.00. An independent appraisal of the property was not obtained by the lender prior to the loan closing and it had not undertaken any due diligence. Borrower's counsel represented the seller on the Borrower's purchase of the property and signed the letter agreement as seller's counsel.

The Borrower defaulted on the loan; the lender discovered the facts recited above, and sued the Borrower's counsel for fraud. It sought to amend its complaint to add a cause of action for negligent misrepresentation. The Supreme Court, New York County, denied the motion to amend and granted the Defendant's motion to dismiss the complaint. The Appellate Division, First Department reversed the lower court's dismissal of the complaint. According to the Appellate Division, "whether plaintiff was justified in relying on Noto's opinion letter is a

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question for the trier of fact". The Appellate Division also granted the Plaintiff's motion to amend its complaint. The "plaintiff's allegations that Noto prepared the opinion letter at its request, provided the letter to plaintiff, and did so understanding that plaintiff would rely upon it in making the loan at issue, were sufficient to plead a privity-like relationship for purposes of its claim in the proposed amended complaint of negligent misrepresentation". Remediation Capital Funding LLC v. Noto, 2017 NY Slip Op 01119, decided February 10, 2017, is reported at [http://www.nycourts.gov/reporter/3dseries/2017/2017\\_01119.htm](http://www.nycourts.gov/reporter/3dseries/2017/2017_01119.htm).

### Limited Liability Company

Under a limited liability company's operating agreement, a member owning "more than 50% in Membership Interest may transfer all, or any portion of, or any interest in, the Membership Interest owned by the Member". In addition, "upon the occurrence of an Involuntary Withdrawal [including the death of a Member], other than for Cause, the successor of the Withdrawn Member shall thereupon become an Interest Holder but shall not become a Member" and, within 180 days of the date of an involuntary withdrawal, the surviving member "shall pay the successor Interest Holder the Net Book Value per unit of his Interest".

The member holding a 70% membership interest died and his Will bequeathed his membership interest to a living trust. The surviving member commenced an Action seeking a declaration that the Executor of the decedent's estate was obligated under the Operating Agreement to sell the 70% membership interest to him at net book value.

The Supreme Court, Monroe County, denied motions for summary judgment, holding that there were issues of fact as to the decedent's intent. The Appellate Division, Fourth Department, reversed, granting the Plaintiff's cross-motion for summary judgment, holding that the Estate of the deceased member must transfer the decedent's interest in the company to the other member at net book value. According to the Appellate Division, provisions of the operating agreement "allow the owner of a majority interest to transfer all or some of that interest during his or her lifetime; however, upon that member's death, his or her interest ceases to be a membership interest at the time it passes to his or her successor, who is then obliged to sell the interest back to [the Plaintiff] at net book value". Maven Technologies, LLC v. Vasile, 2017 NY Slip Op 00840, decided February 3, 2017, is reported at [http://www.nycourts.gov/reporter/3dseries/2017/2017\\_00840.htm](http://www.nycourts.gov/reporter/3dseries/2017/2017_00840.htm).

### Mortgage Foreclosures

The Supreme Court, Nassau County, denied the Defendants' motion to stay the foreclosure sale until there was a determination of their request to the Plaintiff for a HAMP modification of their mortgage loan. According to the Court, "[u]nder New York law, plaintiff is under no obligation to modify the terms of [defendants'] mortgage'... and is only required to negotiate in good faith... Indeed, the relevant statute, 12 USC Section 2605(f) (12 CFR Section 1024.41(a)) 'does not permit injunctive relief'" (citations omitted). Because the title company would not insure the conveyance by the referee to the successful bidder at the foreclosure sale, the Plaintiff moved to set aside the prior foreclosure sale. The Supreme Court granted the motion and remanded the case for a new foreclosure sale. The Court noted that the motion for a stay did not constitute reasonable doubt sufficient to affect the marketability of title. U.S. Bank N.A. v. Rahman, 2016 NY Slip Op 32670, decided October 31, 2016, is reported at [http://www.nycourts.gov/reporter/pdfs/2016/2016\\_32670.pdf](http://www.nycourts.gov/reporter/pdfs/2016/2016_32670.pdf).

### Mortgage Recording Tax

As reported in Current Developments dated November 3, 2016, Chapter 394 of the Laws of 2016, effective September 30, 2016, amended Sections of New York State's General Municipal Law, Public Authorities Law and Tax Law to require that the portion of the mortgage recording tax known as the "Additional Tax" be paid on recording a mortgage to which an Industrial Development Agency is a party in a county in which the Additional Tax applies. Chapter 3 of the Laws of 2017 changed the effective date of Chapter 394 to July 1, 2017. As noted in a Technical Memorandum (TSB-M-17(1)R) issued by New York State's Department of Taxation and Finance dated February 2, 2017, "if the additional mortgage recording tax was paid on an IDA mortgage recorded on or after September 30, 2016, but prior to July 1, 2017, a taxpayer may claim a refund by filing Form MT-15.1..." The Department's Memorandum is posted at [https://www.tax.ny.gov/pdf/memos/mortgage/m17\\_1r.pdf](https://www.tax.ny.gov/pdf/memos/mortgage/m17_1r.pdf).

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### Mortgage Recording Tax/New York State Transfer Tax

New York's Department of Taxation and Finance announced that the interest rate to be charged for the period April 1, 2017 – June 30, 2017 on late payments and assessments of Mortgage Recording Tax and the State's Real Estate Transfer Tax will be 8% per annum, compounded daily. The interest rate to be paid on refunds will be 3% per annum, compounded daily. The notice issued by the Department is posted at [https://www.tax.ny.gov/pay/all/int\\_curr.htm](https://www.tax.ny.gov/pay/all/int_curr.htm).

### Mortgages

A receiver appointed to windup the business of a corporation entered into a contract to sell the corporation's assets, including real property being foreclosed. The receiver moved for an Order directing that on the sale of the real property he be authorized to deliver to the foreclosing mortgagee's attorney an amount to pay off the mortgage and an estimated amount for interest that would accrue, to be held in escrow. The receiver also requested that the Order provide, to enable the property to be sold, that when the money was paid into escrow the Court, would direct the County Clerk to discharge the mortgage. The Supreme Court, Greene County, granted the receiver's motion, stating that the payment into escrow would be "substitute collateral" for the mortgage.

The Appellate Division, Third Department, reversed the lower court. RPAPL Section 1921 ("Discharge of mortgage") "did not provide [the] Supreme Court with the authority to direct the County Clerk to mark the mortgage as discharged of record". In addition, even if Uniform Commercial Code Section 9-313 ("When possession by or delivery to secured party perfects security interest without filing") applied, "[i]t does not authorize the Supreme Court to substitute plaintiff's collateral..." Further, Business Corporation Law Section 1206 ("Powers of permanent receiver") does not authorize a receiver to dispose of real property free and clear of liens. *Krupnick v. Windy Ridge Corporation*, 2017 NY Slip Op 01419, dated February 23, 2017, is posted at [http://www.nycourts.gov/reporter/3dseries/2017/2017\\_01419.htm](http://www.nycourts.gov/reporter/3dseries/2017/2017_01419.htm).

### New York City/Real Estate Taxes

Bills for the real estate taxes payable April 1, 2017 can be obtained on New York City Finance Department's website at <http://www1.nyc.gov/site/finance/taxes/property-tax-bills.page>.

### NYC Real Property Transfer Tax/Housing Development Fund Company ("HDFC")

As reported in Current Developments dated September 26, 2016, Chapter 264 of the Laws of 2016, effective August 19, 2016, added paragraph 9 to New York City Administrative Code Section 11-2106 ("Exemptions"), allowing for a full or a partial exemption from New York City's transfer tax when real property or an economic interest in an entity owning real property is transferred by or to an HDFC and when real property is transferred to an entity in which a controlling interest is held by an HDFC. New York City's Department of Finance has issued "Claiming a New York City Real Property Transfer Tax Exemption for Transfers to or from Housing Development Fund Companies (HDFC) – Interim Solution for using ACRIS to create NYC-RPT", posted at [http://www1.nyc.gov/assets/finance/downloads/pdf/acris/claiming\\_nyc\\_real\\_property\\_transfer\\_tax\\_exemption.pdf](http://www1.nyc.gov/assets/finance/downloads/pdf/acris/claiming_nyc_real_property_transfer_tax_exemption.pdf).

### NYS Real Estate Transfer Tax/"Reverse" Like-Kind Exchange

The Department of Taxation and Finance issued an Advisory Opinion taking the position that the transfer of real property from an "exchange accommodation titleholder" to a taxpayer as part of a "reverse" like-kind exchange under 26 U.S.C. Section 1031 is not subject to the real property transfer tax. TSB-A-16(2)R, dated December 7, 2016, is posted at [https://www.tax.ny.gov/pdf/advisory\\_opinions/real\\_estate/a16\\_2r.pdf](https://www.tax.ny.gov/pdf/advisory_opinions/real_estate/a16_2r.pdf).

### Notice of Pendency

The proceeds of a mortgage loan were fraudulently transferred and the existing mortgages were never satisfied. The title insurer which insured the mortgage took the mortgage by assignment in satisfaction of a claim by its insured, and sought an injunction preventing the Defendant, a guarantor of the mortgage loans intended to be paid-off, from transferring any interest in a condominium unit which she owned. Under her guarantee, the Defendant pledged not to convey, transfer or encumber her assets. A notice of pendency was filed.

The Supreme Court, New York County, granted the Plaintiff's motion for an Order granting a three year extension of

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the notice of pendency. Under Civil Practice Law and Rules Section 6513 (“Duration of notice of pendency”), “for good cause shown”, a Court may grant an extension of a notice of pendency; there was good cause to extend the notice of pendency because continuing litigation to determine the priority of the senior mortgages delayed the relief sought against the Defendant. The Court also granted an injunction preventing the Defendant from disposing of any interest in the condominium unit while amounts due to the Plaintiff under the guarantee remained unpaid. *Stewart Title Insurance Company v. Jacobowitz*, 2017 NY Slip Op 30042, decided January 9, 2017, is posted at [http://www.nycourts.gov/reporter/pdfs/2017/2017\\_30042.pdf](http://www.nycourts.gov/reporter/pdfs/2017/2017_30042.pdf).

### Property Condition Disclosure Act

Under a Real Property Law Article 14 (“Property condition in the sale of residential real property”) Property Condition Disclosure Statement (“Statement”) delivered to the Defendant-purchasers in 2005, they were informed that there were some water seepage issues in the basement, some drainage problems on the property and cracks in the basement which had been repaired. An inspection report stated that the inspector “did not observe...any vertical movement of the soils at the level of the basement foundations”. In 2009, the purchasers, now owners of the property, repaired a crack in the basement wall. The Plaintiffs purchased the property from them in 2010. The Plaintiffs were provided with a Statement reciting that there were no water seepage issue in the basement; a home inspector engaged by the Plaintiffs also advised that there were no issues.

After closing, cracks appeared in the basement and in walls on the first and second floors of the house, and water began leaking into the basement. The Plaintiffs commenced an Action against their sellers, the prior owners and the Plaintiff’s realtors, seeking damages for fraud, breach of contract, gross negligence, and breach of fiduciary and statutory duties. The Supreme Court, Erie County’s dismissal of the complaint was affirmed by the Appellate Division, Fourth Department.

According to the Appellate Division, the prior sellers made no statements or representations to the Plaintiffs and they did not assist the Plaintiffs’ sellers in perpetuating any fraud. Further, there was no evidence that the condition was concealed by the Plaintiff’s sellers, and although the Statement provided the Plaintiffs “was silent with respect to any water seepage or water dampness in the basement, Plaintiffs’ home inspection report put them on notice of that issue, and plaintiffs therefore cannot assert that they justifiably relied on the fact that [the Statement] failed to mention it”. The Defendant brokers did not have any actual knowledge of any defect. *Gallagher v. Ruzzine*, 2017 NY Slip Op 00891, decided February 3, 2017, is reported at [http://www.nycourts.gov/reporter/3dseries/2017/2017\\_00891.htm](http://www.nycourts.gov/reporter/3dseries/2017/2017_00891.htm).

### Recording Act

Defendants in an Action to foreclose a mortgage asserted that the Plaintiff was not a bona fide encumbrancer for value because they were in open possession of the condominium unit being foreclosed. The Supreme Court, Kings County, struck that affirmative defense, and granted the Plaintiff’s motion for summary judgment and for an order of reference. The Appellate Division, Second Department, affirmed the ruling of the lower court. According to the Appellate Division, while the Plaintiff did not inquire as to the reason for the Defendant’s occupancy, their possession “was not inconsistent with the title of the apparent owner of record”. An agreement between the unit owner and one of the Defendants in occupancy was not enforceable because it did not satisfy the statute of frauds; there was no deed conveying the unit to that Defendant. *Bohensky v. 3912 NU Rainspring, LLC*, 2017 NY Slip Op 01530, decided March 1, 2017, is reported at [http://www.nycourts.gov/reporter/3dseries/2017/2017\\_01530.htm](http://www.nycourts.gov/reporter/3dseries/2017/2017_01530.htm).

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## Michael J. Berey

Senior Underwriting Counsel

Reporting Current Developments since 1997

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[mberey@firstam.com](mailto:mberey@firstam.com)