First American Title Insurance Company of New York

228 East 45th Street, New York, New York 10017

CURRENT DEVELOPMENTS

This is another in a series of bulletins issued to clients of First American. As issues are being sent by email only, other readers are requested to send their email addresses to Michael J. Berey, Senior Underwriting Counsel, at mberey@firstam.com. Issues of "Current Developments" are on the Internet at www.FirstAmNY.com.

Federal Forfeitures – "The Civil Asset Forfeiture Act of 2000" was enacted on April 25, 2000 as Public l.aw No. 106-185, It is effective as to any forfeiture proceeding commenced 120 days on or after the date of enactment. According to the American Land Title Association, the law "limits the Federal government's ability to seize real property which has been involved in the commission of a crime…It establishes new procedural requirements for real property forfeitures…It fosters legal certainty in real estate transactions by clarifying protections for persons owning real property through the 'innocent owner' defense…This defense extends to lenders…(and) raises the standard of evidence that the federal government must meet in order to forfeit properties. In addition, the bill requires that real property be forfeited through judicial rather than administrative proceedings". The bill, H.R. 1658, can be located on the internet at http://thomas.loc.gov/cgi-bin/query/z?c106:H.R.1658.ENR:

Lien Law – The Appellate Division, First Department, in Bran Electric Inc. v. MHA, Inc., reversing the lower court, granted a motion to discharge a subcontractor's notice of mechanics lien, and to dismiss the subcontractor's complaint insofar as it sought payment on the bond that discharged the lien. The lien was held to be invalid for failing to identify the general contractor with which the plaintiff contracted as required by Lien Law Section 9, Subdivision 3. The case is reported at 703 NYS2d 115.

Mortgage Foreclosure – The Appellate Division, First Department, in Tri-Land Properties, Inc. v. 115 West 28th Street Corp., reported at 791 NYS 2d 16, held that a writ of assistance under Real Property Law Section 221 can be issued to evict occupants who were parties to the foreclosure, served with a copy of the judgment of foreclosure and sale, and duly apprised of the foreclosure sale.

Mortgage Foreclosure – A federal district court for the Southern District of New York held that a participant in a mortgage loan waived its right as the holder of a junior interest to foreclose under RPAPL Section 1315 by reason of provisions in the Participation Agreement granting the holder of the senior mortgage interest the power to administer the loan and enforce any remedies. Federal Deposit Insurance Corp. v. Four Star Holding Co. was reported in the New York Law Journal on March 21, 2000 on page 35.

Mortgage Recording Tax - The Technical Services Bureau of the New York State Department of Taxation and Finance has informally advised that it has taken certain further positions on application of the New York State mortgage recording tax to mortgages involving credit lines..

Section 253-b of New York State's Tax Law provides that a commercial credit line mortgage recorded on and after November 6, 1996 which secures at the date of execution or at any time thereafter a maximum principal debt of less than $3,000,000 will not be subject to additional mortgage recording tax on re–advances. In addition, under Section 253-b, a credit line mortgage on real property principally improved or to be improved by a one to six family owner occupied residence or dwelling is exempt from mortgage recording tax on re-advances.

The Bureau's Memorandum issued June 25, 1999 (TSB-M-99(1)R, on the "Application of the Mortgage Recording Tax to Commercial Credit Line Mortgages") set forth the following:

> **"Question Three: If a debt in the form of a revolving credit agreement of $3 or more was partially secured by a credit line mortgage of less than $3 million, would the mortgage received the benefit of section 253-b?**
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> **"No. The indebtedness under the note, credit agreement or other financing agreement must limit the aggregate amount at any time outstanding to a maximum amount specified in the mortgage or deed of trust" (Emphasis added).**

The Memorandum thus clearly indicated a credit line mortgage can not be executed for less than $3,000,000 to secure a portion of a credit facility of $3,000,000 or more and obtain the benefit of Tax Law Section 253-b. A credit

line mortgage cannot, for example, secure $2,999,999 when the overall credit facility was $100,000,000 and receive the benefit of the Section.

Technical Services has taken the position that Section 253-b requires, and the above quoted portion of the TSB was intended to further indicate, that the amount secured by a commercial credit line mortgage and the amount secured by a mortgage on a one to six family owner occupied residence or dwelling must be the same as the amount of the related credit line to obtain the benefit of the Section, regardless of the value of the property mortgaged.

A commercial mortgage securing advances and re-advances can not, for example, be executed for $100,000, encumbering property with an appraised or fair market value of that amount, and obtain the benefit of the statute when the credit facility is less than $3,000,000 but greater than the secured amount.

Technical Services has made this interpretation from its analysis of Subdivision 2 of Section 253-b which provides, in part:

> **"(A) 'credit line mortgage' shall mean any mortgage…which states that it secures indebtedness under a note, credit agreement or other financing arrangement that reflects the fact that the parties reasonably contemplate entering into a series of advances, or advances, payments and readvances, and that limits the aggregate amount at any time outstanding to a maximum amount specified in such mortgage…". (Emphasis added).**

Second, accepted custom and practice has been for a mortgage securing the third party guarantee of the obligations of a borrower under a revolving credit agreement to secure a specified, non-revolving amount and, on that basis, the guarantee mortgage would not be subject to additional mortgage recording tax as the borrower received re-advances.

The Technical Services Bureau has informally advised that it will treat a mortgage guaranteeing the revolving credit obligations of a borrower's as if the mortgage secured taxable re-advances. Accordingly, a guarantee mortgage will be subject to mortgage recording tax as re-advances are made to the borrower unless the mortgage specifies that it secures an identified non-revolving portion of the credit facility, which may be the last amount repaid and not re-advanced. This should not apply to a guarantee mortgage covered by Section 253-b which secures the same amount as the borrower's credit line, as noted above.

Mortgage Recording Tax – Citing the decision in City of New York v. Tax Appeals Tribunal at 660 NYS 2d 753, the state's Division of Tax Appeals affirmed the Division of Taxation's decision to refund tax paid on mortgages made by certain cooperative housing corporations to the extent the loan proceeds refinanced debt secured by mortgages underlying existing wrap – around mortgages. In the Matter of the Petitions of City of New York, DTA Nos. 816772, 816773, 816774 and 816775, decided April 13, 2000, can be found on the Internet at http://www.nysdta.org/Decisions/816772.dec.htm. According to the New York Law Journal on April 25, 2000, the City intends to file an appeal.

Prejudgment Attachments – The Court of Appeals reversed an order of the Appellate Division affirming the grant of a preliminary injunction to restrain a debtor-defendant's possible transfer of its assets to defeat the satisfaction of any anticipated judgment. The Court held that CPLR Section 6301 affords no such pre-judgment right in a general creditor's action on a debt. Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, decided March 30, 2000, can be found at http://www.courts.state.ny.us/ctapps/decisions/64opn.htm.

Real Estate Taxes – The Appellate Division, Second Department, in Matter of Orange and Rockland Utilities v. City of Middletown Assessor, reported at 703 NYS 2d 218, has held that electric wires and gas pipes traversing over or under the premises of a utility's customers do not constitute taxable real property.

Recording Act – The Supreme Court, Westchester County, in IMC Mortgage v. Hudson, reported in the New York Law Journal on March 22, 2000 on page 36, held that a mortgage made prior to the docketing of a judgment has priority over the judgment although the mortgage is recorded after the judgment is docketed.

Suffolk County – On March 28, 2000 the Suffolk County Legislature passed its Resolution No. 245-2000, "A Local Law to Require Well-Water Testing Prior to Acquisition of Residential Home". No purchase of a residential dwelling with a private water supply is to be consummated until the purchaser obtains a written certification from a New York State approved laboratory that the system conforms to the water quality requirements of the Suffolk County Department of Health Services. The certification is to be attached to the deed to enable

recording. This requirement can be waived only by a specific provision in the contract of sale. This will apply to contracts for the purchase and sale of residential dwellings on or after the effective date of the Local Law, which will be the date on which the Law is filed in the office of the Secretary of State. It is believed that the Suffolk County Clerk may not enforce the recording requirement without state legislation. For further information contact Vincent Ferro at 516-832-3200.

Tax Sales – Opposite positions have been taken on whether a mortgage cut off in a tax lien foreclosure is restored when the property is repurchased by the prior owner-mortgagor. The Supreme Court, Delaware County, in First National Bank of Downsville v. Atkin, reported at 704 NYS 2d 440, held that property obtained by the county through a tax foreclosure under Article 11 of the Real Property Tax Law can be resold to the prior owner at a private sale without a foreclosed mortgagee's lien reattaching to the premises. Cut off in the tax foreclosure, the mortgage is no longer a valid lien. The mortgagee may proceed in an action to enforce the note.

However, the Supreme Court, Orange County held that a mortgage's "after – acquired interests" clause is effective to restore the lien of a mortgage cut–off by a tax foreclosure sale on purchase of the property by the owner-mortgagors. Federal Home Loan Mortgage Corp. v. Smallwood, was reported in the New York Law Journal on April 12, 2000 on page 35, at column 4.

Water Meters – New York City: In 1988, the New York City Department of Environmental Protection ("DEP") announced a program designed to change the way property owners pay for water usage. Every building in the City of New York is required to have a water meter installed and an owner is to be billed for the amount of water consumed instead of the amount due being computed based on the building's frontage.

After trying to solicit voluntary compliance, the DEP has issued notices advising property owners who fail to begin the water meter installation process that they will be subject to a 100% surcharge on their 2000-2001 annual frontage bill for the period commencing July 1, 2000. This surcharge will be a recurring annual charge until a water meter is installed. When a water meter is finally installed, the surcharge will be pro-rated with the amount of the surcharge for the balance of the year canceled. Further information can be obtained from the DEP's Website at http://www.ci.nyc.ny.us/dep.

May 17, 2000