First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

This is another in a series of bulletins issued by email to clients of First American. Prior issues are maintained on the Internet at www.titlelaw-newyork.com. For further information on any item in this bulletin contact mberey@firstam.com.

Title Insurance for UCC Article 9

First American's Eagle 9 ™ UCC Insurance Policy ("UCC Policy") was accepted by the New York State Insurance Department on April 23, 2001 and is available in this state only from the First American Title Insurance Company of New York. The UCC Policy is a separate and distinct policy of title insurance providing perfection and priority insurance to a lender taking as collateral for a loan a security interest under Article 9 of the Uniform Commercial Code. This would benefit, for example, a Mezzanine Lender making a loan secured by a pledge of partnership or membership interests in an entity making a mortgage on an interest in real estate. Revised Article 9, drafted under the supervision of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, is expected to be enacted in New York State and to be effective in most all states and the District of Columbia on July 1, 2001.

The policy insures the lender, as of the policy date, against actual loss or damage sustained due to the failure of the insured security interest to "attach", or be effective, as against the debtor. Within the scope of this coverage is protection against claims against lack of authority and capacity and against other challenges to the effectiveness of the security agreement. This coverage will be increasingly important to lenders as secured transactions, encouraged by the more liberal requirements of Revised Article 9, take place electronically without the use of actual signatures. Note that Revised Article 9 requires only that a "Record" be "Authenticated" which allows, for example, a security agreement to be entirely in an electronic format without an actual, physical signature.

The UCC Policy further insures that the lender's security interest is properly "perfected", assuring the lender that its financing statement (i) meets the requirements of Revised Article 9 as to form and content, (ii) that the financing statement was (if a filing is required) filed in the proper filing office, and (iii) that the insured lender's security interest is not subject to, and is enforceable against, other secured parties, lien creditors and post-policy interests. For example, under Revised Article 9, a financing statement with an incorrect debtor's name or an improper collateral description will be defective and as a result the lender's position may be rendered unsecured.

The UCC Policy also protects against loss incurred by the insured lender if a claim is asserted in a case filed by or against the debtor in an adversary proceeding under the Bankruptcy Code contending that the insured security interest is not valid or enforceable or does not have the priority as insured. The title insurer will pay the cost, legal fees and expenses incurred in defending the insured security interest and a loss covered by the UCC Policy.

Title Insurance Policy Endorsements

Effective April 24, 2001, a Market Value Rider for the TIRSA Owner's Extended Protection Policy ("EAGLE Policy"), a Mezzanine Financing Endorsement, and a combined Waiver of Arbitration Endorsement can be issued for title insurance policies in New York State. Revisions to the ALTA 8.1 Environmental Protection Lien endorsements and the New York City "Air Rights" endorsements were also accepted by the New York State Insurance Department.

Environmental Protection Lien Endorsements - In addition to making non-substantive modifications to the text of the New York State and New York City versions of the Title Insurance Rate Service Association, Inc.'s 8.1 endorsements, the endorsements were amended to delete the sentence limiting issuance of the endorsements to title policies insuring mortgages on land used or to be used primarily for residential purposes. These revised endorsements can now be issued for loan policies on both residential and commercial property. The charge for the endorsements remains at $25.00

Market Value Policy Rider for the TIRSA Owner's Extended Protection Policy – The amount of insurance under the recently adopted EAGLE Policy increases automatically by 10% each year for the first five years up to 150% of the policy amount. The Insurance Department has, however, taken the position that to comply with Insurance Law Section 6409(c) a Market Value Policy Rider must be made available when this policy is issued. Section 6409(c) requires each title insurer to offer "an optional policy form which will insure the title of owner-occupied real property used predominantly for residential purposes which consists of not more than four dwelling units for an amount equal to the market value of the property at the time a loss is discovered". This Market Value Policy Rider deletes the provision of the EAGLE Policy that automatically increases the policy amount. The charge for the endorsement is 5% of the premium being charged for the related Owner's Policy.

Mezzanine Financing Endorsement – This endorsement, providing loss payee coverage to a Mezzanine Lender can be issued only as part of an Owner's policy insuring the real property interest-owning entity (the "Insured Owner"). The charge for the endorsement under the TIRSA Rate Manual is 30% of the premium payable for the Owner's policy to which the endorsement is attached. The endorsement can be issued by an agent only with the approval of its underwriter.

Under the endorsement, payment for a loss under an Owner's Policy *prior to* the lender foreclosing on a pledge of an interest in the Insured Owner is to be made to the Mezzanine Lender. The amount payable to the Lender is not to exceed the aggregate as of the date of the loss of the outstanding principal balance of the Mezzanine Loan, and, insofar as they relate to the Mezzanine Loan, accrued interest, fees and costs due the Lender, and protective advances made. In the event of a loss under the Owner's Policy *after* the Mezzanine Lender acquires some or all of the pledged member or partnership interests in the Insured Owner, as the case may be, the amount of the payment to the Mezzanine Lender is to be determined based on the actual loss multiplied by the percentage interest in the Insured Owner acquired by the Mezzanine Lender pursuant to a pledge at the time the loss is paid.

If there is a loss under the Owner's Policy *prior* to the Mezzanine Lender acquiring an interest in the Insured Owner pursuant to a pledge, the Mezzanine Lender will not be required to pursue its remedies against other collateral. For a loss under the Owner's Policy *after* the Mezzanine Lender acquires a pledged interest, the Company will not impute to the Lender, as a defense to payment under the endorsement, knowledge of a title defect not excepted in the Owner's Policy of which the Lender did not have actual knowledge on the Policy Date, even though the title defect was known to any of the Insured Owner, a Mezzanine Loan borrower, or the holder of any interest in or an affiliate of a Mezzanine Loan borrower. The Endorsement also provides that the Company will not deny liability to the Insured Owner on the ground that the Mezzanine Lender pursuant to a pledge has acquired any of the partnership or limited liability company interests.

The Mezzanine Financing Endorsement does not insure the validity, priority, form, sufficiency or enforceability of a pledge or of any other documents effectuating the Mezzanine Loan. Title insurance for that security interest may be obtained from First American under its Eagle 9 ™ UCC Insurance Policy.

<u>New York City Development Rights Endorsement</u> – Formerly identified as the "TIRSA New York City 'Air Rights' Endorsement", the endorsement has been amended to properly identify its subject matter as "Development Rights", to correct the recital of the effective date of the New York City Zoning Resolution, and to delete reference to a "seller" and a "purchaser" as those terms may not always be applicable. The charge for this endorsement remains at $25.00.

<u>Waiver of Arbitration Endorsement</u> – Instead of there being separate Waiver of Arbitration endorsements for Owner's and Loan policies, and as the endorsement needed also to be issued for the EAGLE Policy, a unified Waiver of Arbitration endorsement is now available for use with any of these three policy forms. The charge for this endorsement remains at $25.00.

May 15, 2001