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.firstamny.com. For further information contact mberey@firstam.com.

Bankruptcy – The Debtor assigned a lease pursuant to an order of the Bankruptcy Court. Several months later the Court entered an order confirming its Plan of Reorganization. Its lessor then filed a notice of appeal of the Confirmation Order raising issues relating to the lease assignment. The United States District Court for the Southern District of New York held that the Assignment Order was a final order under 28 USC Section 158(a), and a notice of appeal had to be filed within 10 days of the date on which that Order was entered. The Court, therefore, had no jurisdiction to hear claims relating to the lease assignment. The District Court further found that the assignee of the lease was protected under 11 USC Section 363(m) which protects a purchaser in good faith, whether or not it knows of the pendency of an appeal, unless the sale was stayed pending appeal. The Bankruptcy Court had found that the purchaser was acting in good faith and no stay was obtained pending appeal. In re Collect Pound House, Inc. v. CSM Realty Corp., decided August 28, 2001, is reported at 2001 U.S. Dist. LEXIS 13047.

Bankruptcy - Section 506(a) of the Bankruptcy Code provides that a lien is an unsecured claim to the extent that the value of the creditor's interest in the property is less than the amount of the lien. However, Section 1322(b)(2) provides that "a Chapter 13 plan may modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence…". The United States Court of Appeals for the Second Circuit, affirmed the holding of the District Court for the Northern District of New York voiding a fourth mortgage lien under a Chapter 13 plan as being wholly unsecured under Section 506, there being insufficient equity in the property to cover any part of the mortgage. The Court of Appeals concluded that the exception in Section 1322 protects a creditor's rights in a mortgage lien only where the debtor's residence retains enough value, after accounting for other, more senior liens, that it is at least partially secured under Section 506. Pond v. Farm Specialist Realty, decided May 31, 2001, is reported at 252 F. 3d 122.

Condemnation - In a case involving the development of wetlands in Rhode Island, the United States Supreme Court, reversing in part the Rhode Island Supreme Court, held that an inverse condemnation claim was not barred because the claimant took title with notice of an earlier enacted state regulation restricting wetlands development. According to the Court, "it would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership

where the steps necessary to make the claim ripe were not taken, or not have been taken, by a previous owner". However, the Court, affirming the state court, held that there was no taking since the uplands portion of the property could still be improved. Palazzolo v. Rhode Island, decided June 28, 2001, is reported at 69 U.S.L.W. 4605.

Condominiums – The Appellate Division, Third Department, held that a power of attorney executed to a Board of Mangers by unit owners, appointing the members of a Condominium Board as attorneys-in-fact to deliver any easement, declaration, or amendment to the Condominium or the Common Elements, does not authorize the President of a Board of Managers, acting alone, to consent to the construction of a balcony extending from a unit. Whether the proposed balcony was a "material" structure requiring the consent of other unit owners affected under Real Property Law Section 339-k was an issue precluding summary judgment. Odell v. 704 Broadway Condominium, decided July 26, 2001, is reported at 728 NYS 2d 464.

Cooperatives – The Appellate Division, First Department, held that a sponsor's offering plan is a contract and that an action for breach of contract may be brought if unsold units are not sold within a reasonable time. Units not having been sold for ten years, there existed an issue of fact as to whether the delay was reasonable. The Court, however, dismissed claims for violations of the disclosure requirements of General Business Law Sections 349 ("Deceptive acts and practices unlawful") and 350 ("False advertising unlawful") since the Attorney General has exclusive jurisdiction to prosecute violations of the Martin Act. 511 West 232nd Owners Corp. v. Jennifer Realty Co., decided August 9, 2001, is reported at 729 NYS 2d 34.

Mortgages – A mortgagee generally has no duty to the purchaser of a home from a builder to ensure that the home being purchased is structurally sound or that it has been issued a certificate of occupancy. However, a mortgagee and its assignee may be held accountable when the mortgagee participated in or had knowledge of the builder/seller's fraudulent conduct. Accordingly, the Supreme Court, Suffolk County, finding there was an issue as to whether the mortgagee had knowledge of the fraudulent conduct, dismissed the assignee's motion for summary judgment. Barnes v. Countrywide Home Loans, Inc. was reported in the New York Law Journal on August 1, 2001.

New York City – Real Property Actions and Proceedings Law, Article 7-A ("Special Proceedings By Tenants ….For The Purpose of Remedying Conditions Dangerous to Life, Health or Safety") authorizes a Court to appoint an Administrator to oversee rehabilitation of an unsafe multiple dwelling. An Administrator can apply to the City's Department of Housing Preservation and Development for a loan to rehabilitate the building. Under Section 27-2144 of the City's Administrative Code, the HPD loan to the Administrator is a lien entitled to super-priority after a statement of account is filed in the office of the City Collector. The lien is not enforceable against a subsequent purchaser or mortgagee acting "in good faith" unless HPD files in its offices a publicly accessible record of the work performed. In

this instance the City did not file work orders and the statement of account was filed in the office of the City Collector after the property was purchased first in a foreclosure and then out of a bankruptcy.

The Supreme Court, Bronx County, granted a summary judgment motion to discharge the City's lien. That order was modified by the Appellate Division, which held there was a triable issue of fact as to whether the plaintiff was a good-faith purchaser without knowledge of the loan. The Court of Appeals reversed the Appellate Division and granted summary judgment, finding that the lien could not be enforced since the City did not follow the statutory notice procedures. The Court of Appeals did not, however, address whether a purchaser's actual knowledge retroactively subjects a property to the HPD lien since the City did not raise a triable issue of fact as to the plaintiff's actual notice.

Rosenbaum v. City of New York, decided July 5, 2001, is on the Internet at http://www.courts.state.ny.us/ctapps/decisions/99opn01.pdf.

Partnerships – A general partner was held not to have the authority to grant a 99 year lease of property owned by the partnership since the lease would expire after the term of the partnership. According to the Appellate Division, Third Department, the making of such a lease was not within the ordinary course of this partnership's business. (New York Partnership Law, Section 20(1)). The court also stated that the other partners, having "equal rights in the management and conduct of the partnership business" (Partnership Law Section 40(5)) could have prevented the transaction even if the lease was made in the ordinary course of business. Northmon Investment Company v. Milford Plaza Associates, decided June 26, 2001, is reported at 727 NYS 2d 419.

Real Estate Taxes - The Nassau County Department of Assessment rescinded a partial tax exemption granted under Real Property Tax Law Section 467 when the owners entitled to the exemption conveyed the property to their children subject to their reservation "for their lives, (of) the possession, use and enjoyment of the premises". The deed further recited that their possession "should not be subject to assignment or lease". The Supreme Court, Nassau County dismissed the action seeking to compel reinstatement of the exemption, holding that the deed, by restricting the grantors from obtaining any rents or profits, reserved in the grantors a right of occupancy, not a life estate. Reservation of a life estate would have enabled continuation of the exemption. 9 Op. Counsel S.B.E.A. 49. Matter of Jodice v. The Nassau County Department of Assessment was reported in the New York Law Journal on August 15, 2001.

Synthetic Leases – An Advisory Opinion (TSB-A-01(7)R) was issued by the Technical Services Division of the New York State Department of Taxation and Finance on July 26, 2001 in response to a petition filed by Time Warner Inc. ("TWI") relating to the financing of the construction of a condominium unit which will be its world headquarters at property located adjacent to Columbus Circle in

New York City. The Advisory Opinion indicates that (i) the deed of the unit from the fee owner LLC to the State Street Bank and Trust Company, as Trustee, will be deemed both a conveyance of title to TWI that is a mere change of identity and a mortgage from TWI to the Trustee subject to mortgage recording tax; (ii) the leaseback from the Trustee to TWI secures the same debt as that secured by said mortgage; and (iii) the conveyance of fee title to TWI on termination of the synthetic lease will be deemed the satisfaction of that mortgage. These instruments are not subject to state transfer tax. The deed will, however, be subject to mortgage recording tax to the extent it secures indebtedness on which mortgage recording tax had not been paid. (A severed portion of the LLC's mortgage, equal to TWI's share of the secured construction financing, is being assigned to the Trustee's mortgagee. However, the synthetic lease is also intended to finance TWI's allocable portion of land acquisition, which amount had not been secured by the LLC's mortgage.) See http://www.tax.state.ny.us/pdf/Advisory_Opinions/Real_Estate/A01_7r.pdf.

Tax Sales – The Appellate Division, Third Department, held that the interest of a mortgagee did not reattach after real property deeded to Delaware County in a tax lien foreclosure was repurchased by the former owner for the amount of the outstanding taxes and conveyed to him. It also held that a warranty deed from the former owner delivered prior to its re-acquisition of title passed title to the grantee once the County delivered the deed under the doctrine of after-acquired title. Anderson v. Pease, decided June 28, 2001, is reported at 727 NYS 2d 717.

Tenants–in-Common – The Supreme Court, New York County, held that a tenant-in-common, acting without the consent of the co-tenants, cannot extend a space lease. To do so would deprive the other tenants of their use and enjoyment of the common property. Benetos v. Kasampas was reported in the New York Law Journal on September 26, 2001.

Terrorist Organizations - President Bush signed an Executive Order effective September 24 to freeze the assets of a number of individuals and organizations believed to support or be otherwise associated with the terrorists who committed the recent attacks on the United States. According to the Order all property and interests in property of the "foreign persons" listed are "blocked". The Order provides that "any transaction or dealing by United States persons or within the United States in property or interests in property blocked pursuant to this order is prohibited". The Executive Order, with a list of the individuals and organizations whose assets are frozen, is on the Internet at http://www.ustreas.gov/ofac/bulletin.txt

The thoughts of the officers and employees of First American are with those of our colleagues and their families who were impacted by the events of September 11.

October 3, 2001