First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

A continuing a series of bulletins issued by email to clients of First American

Adverse Possession – An action was brought for a declaration that the plaintiff owned property it purchased from the City of New York and for an order compelling the adjoining owners to remove a fence they erected on the property. The adjoining owners counterclaimed that they owned the property by reason of adverse possession. The Supreme Court, Kings County, denied the plaintiff's motion for summary judgment. The Appellate Division, Second Department, reversed the decision of the lower court and remanded the case for entry of a judgment that the plaintiff owned the property. The defendants admitted in pleadings and at an examination before trial that they knew the subject property was owned by the City when the fence was constructed. According to the court, "(m)ere possession, no matter how long continued, gives no title by adverse possession unless under claim of right". Harbor Estates Limited Partnership v. May, decided May 13, 2002, is reported at 2002 N.Y. App. Div. LEXIS 4890.

Easements – The Appellate Division, First Department, held that the defendant landlord could properly seal a building's airshaft over the objection of a tenant, which claimed that doing so violated its rights to an easement of light and air. According to the court, an easement of light and air cannot be created by implication and there was nothing in the tenant's lease that could be construed as an agreement to create such an easement. Levin v. 117 Limited Partnership, decided February 21, 2002, is reported at 738 NYS 2d 50.

Easements – The Appellate Division, Third Department, affirmed an order of the Supreme Court, Albany County, granting summary judgment to property owners asserting easements for the use of a private beach on the plaintiffs' property and permanently enjoining the plaintiffs from interfering with or obstructing easements for the use of the beach on their property. The plaintiffs claimed that language in deeds to the owners of the neighboring parcels created only a revocable license, but the appellate court held that the language in their deeds stemming from a common grantor, conveying title "together with a right of way over" a private road and "together with the right to use the private beach", created a valid easement. Notwithstanding that the grants did not expressly benefit the grantees' "heirs and assigns", there was no indication that the rights granted were personal in nature or otherwise revocable. Stasack v. Dooley, decided March 14, 2002, is reported at 739 NYS 2d 478.

Federal Tax Liens – The United States Supreme Court, in a case concerning property located in Michigan, has held that a federal tax lien attaches to the interest of a spouse in property held as tenants by the entirety. United States v. Craft, decided April 17, 2002, can be located on the Internet by clicking on the following arrow.

First American News – The New York State Insurance Department on May 17, 2002 accepted for filing First American's EAGLE 9 ™ UCC Insurance Policy for Buyers. The Policy insures a purchaser of personal property against actual loss or damage sustained or incurred by reason of there being (i) a Security Interest of any Secured Party against the Seller in any portion of the Collateral, (ii) a Security Interest of any Secured Party perfected against an owner of the Collateral other than a Seller in any portion of the Collateral, (iii) a Lien of any Lien Creditor in any portion of the Collateral suffered by the Seller or by an owner of the Collateral other than the Seller, and (iv) a perfected federal or state tax lien in any portion of the Collateral. The Policy insures against actual loss or damage sustained or incurred by reason of a claim covered by the insuring provisions arising out of an adversary proceeding under the Federal Rules of Bankruptcy Procedure filed by or against a Secured Party under the Bankruptcy Code to determine the Unencumbered Lien Status of the Collateral. Costs, legal fees and expenses incurred in the defense of the Insured are covered by the Policy. Contact Phillip Salomon at 212-551-9437 for further information.

Lead Paint Regulations – The **January 2, 2001** issue of Current Developments reported on a decision of the Supreme Court, New York County, striking down New York City's lead poisoning law, Local Law 38 of 1999, and reinstating Local Law 1 of 1982. It held that Local Law 38 was enacted without preparation of a required Environmental Impact Statement. On March 26, 2002, the Appellate Division, First Department, reversed the order of the lower court and declared Local Law 38 validly enacted. It found that in adopting a negative declaration, relieving the City of the requirement to prepare an Environmental Impact Statement, "all relevant environmental issues were identified, explored and resolved as mandated" by the State Environmental Quality Review Act. Application of New York City Coalition to End Lead Poisoning, Inc. v. Vallone is reported at 2002 N.Y. App. Div. LEXIS 3159.

Mechanics Liens – Reversing the order of the Supreme Court, New York County, denying the motion of the City of New York to dismiss the complaint for the failure to state a course of action, the Appellate Division, First Department, granted the motion and dismissed the complaint in an action to foreclose mechanics liens filed against two City owned properties. According to the Court, "City owned properties are inalienable under City Charter Section 383...and an entity seeking to secure an interest thereupon must file a 'public improvement lien'" under Sections 5 and 12 of the Lien Law. EMC Iron Works v. The City of New York, entered May 14, 2002, is reported at 2002 N.Y. App. Div. LEXIS 4985.

Mechanics Liens – The defendants were required by the New York State Department of Environmental Conservation to restore their property, on which mining had taken place without a permit. The plaintiffs, adjoining owners, undertook the restoration of defendants' land due to the defendants' delay in doing so and filed mechanics liens to recover expenses incurred against the defendants' property. The Appellate Division, Second Department, affirming the order of the Supreme Court, Suffolk County, vacating the mechanics liens, held that to enforce a mechanic's lien a plaintiff is required to demonstrate that an owner consented to the work done on its property. Here, the defendants had objected to the plaintiff's acts. Zimmerman v. Carlson, decided April 29, 2002, is reported at 2002 N.Y. App. Div, LEXIS 4156.

Mortgages - The holder of a consolidated mortgage erroneously credited its borrower with monies intended for a different loan. Its letter to the borrower advised him that his mortgage had been paid and a satisfaction would issue. In reliance on that letter, as confirmed in telephone calls to that mortgagee, the borrower obtained another mortgage loan from a different lender. Subsequently, the mortgagee discovered its error and commenced an action to foreclose its consolidated mortgage. Notwithstanding the commencement of the foreclosure, the mortgagee recorded a satisfaction of one of the consolidated mortgages. The Supreme Court, Orange County, held that the subsequent lender's mortgage should not lose priority due to the plaintiff's negligence and the representations it made that its mortgage had been paid. The court dismissed the foreclosure, and directed the subsequent lender to settle a judgment declaring it had a first mortgage and ordering cancellation of the satisfaction erroneously filed. The borrower suffered no loss and remains responsible for the debt secured by the now junior mortgage. First Union National Bank v. Tecklenburg, an unreported decision rendered by Justice McGuirk, was issued on March 27, 2002 (Index No. 8177-1998).

Mortgage Foreclosure – The January 2, 2001 issue of Current Developments reported a decision of the Supreme Court, Suffolk County, dismissing a foreclosure action and directing cancellation of a lis pendens to foreclose a mortgage when the mortgagee's agent had erroneously recorded a satisfaction of the mortgage after the action was commenced. The mortgage was held to be unenforceable against a bona fide purchaser who took title relying on the recorded satisfaction. The Appellate Division, Second Department, has affirmed that decision, holding that the purchaser and its mortgagee were entitled to rely on the satisfaction and "had no duty to conduct any further inquiry into the status of the foreclosure action". Regions Bank v. Campbell, decided February 11, 2002, is reported at 737 NYS 2d 636.

New York City Tax Sales – Although requested to do so by the taxpayer, the Department of Finance ("DOF") did not apply to certain property real estate tax credits from other parcels. It also did not credit to the property partial payments made to reduce the amount of the outstanding taxes. After a tax lien against the property was sold in a tax sale to the NYCTL 1996-1 Trust, DOF corrected its error and removed the lien from the Trust. It would not, however, cancel interest accrued

on the outstanding taxes during the period the Trust owned the tax lien. The Appellate Division, Second Department, affirming the decision of the Supreme Court, Queens County, upheld the City's position, relying on Administrative Code Section 11-332(b), which provides that the purchaser of the tax lien is entitled to interest on unpaid real estate taxes and other charges. Matter of Maspeth 5718 Associates, Inc. v. City of New York, decided March 11, 2002, is reported at 739 NYS 2d 414.

Privacy Act – The New York State Bar Association has filed a lawsuit against the Federal Trade Commission to stop enforcement of the Gramm-Leach-Bliley Act as it applies to attorneys. The Act, known also as the Financial Services Modernization Act of 1999, requires financial institutions to disclose to their clients their privacy policies and how they share information with affiliates and third parties. The FTC has taken the position that lawyers engaged in such practice areas as tax and estate planning, real estate closings, and personal bankruptcy are covered by the Act. For further information click on the following arrow.

Rule Against Perpetuities – The April 9, 2001 issue of Current Developments reported on a decision of the Supreme Court, New York County, holding that an agreement granting the plaintiff and his "heirs and assigns" a right to purchase an interest in certain property "at any time hereafter" without limitation as to the time in which the right could be exercised violated the rule against perpetuities. The Appellate Division, Second Department, has reversed this decision. The appellate court construed the provision as providing for the option to be governed by the "measuring lives" of the parties to the grant. "Heirs and assigns" was interpreted to mean that the heirs of the owner would have to honor the option if exercised by the plaintiff. The option would not survive the death of the plaintiff. Reynolds v. Gagen, decided March 28, 2002, is reported at 739 NYS 2d 704.

***"Talkline-The Stoler Report"* - First American Vice-President Michael Stoler's radio show, "Talkline-The Stoler Report", broadcasts Wednesdays at 11PM on WMCA 570 AM. On May 29, Michael Stoler will host a discussion on The State of Retail Development in Metro New York. His guests will be Brad Mendelson, Executive Managing Director, Insignia/ESG, Inc.; Lester Petracca, Principal, Triangle Equities; Richard Farley, RFR Holdings, Inc.; and Joe Sitt, President, Thor Equities, Inc. On June 5, Mr. Stoler will host a discussion on The State of Real Estate in Metro New York – A Veteran's Perspective. His guests will be Jerry Cohen, Principal, Tishman Speyer Properties; and Leonard Boxer, Senior Partner, Stroock & Stroock & Lavan. A list of scheduled programs can be viewed by clicking on the following arrow.**

Terrorism Insurance - Justice Tompkins of the Supreme Court, New York County, authorized the holders of a mortgage on 4 Times Square to draw from the lockbox into which rents from the building are deposited to purchase terrorism insurance. The mortgagor had been notified that it was in default of the mortgage because its "all risks" insurance policy did not cover acts of terrorism. According to the court,

"the potential harm of lack of insurance coverage outweighs plaintiff's potential damage in purchasing additional coverage". The premium for terrorism insurance was estimated to be $3,200,000. Four Times Square Associates, L.L.C. v. Cigna Investments, Inc., was reported in the New York Law Journal on May 7, 2002.

Transfer Tax - The Technical Services Division of the New York State Department of Taxation and Finance on April 3, 2002 issued an Advisory Opinion on the State's Real Estate Transfer Tax. The transfer of a controlling interest in a limited partnership owning real property to an irrevocable grantor retained annuity trust ("GRAT") under which the grantor would (i) be the initial trustee and (ii) receive an annuity for seven years, and after which time (or on the grantor's death) the principal of the trust was to be transferred to a discretionary trust for the benefit of her husband and children, is not exempt from tax as a mere change of identity or form of ownership. The latter transfer of the limited partnership interest from the GRAT to the discretionary trust would, however, be exempt as a mere change. TSB-A-02 (1)R can be located on the Internet by clicking on the following arrow.

USA Patriot Act of 2001 – On April 23, 2002, the United States Department of the Treasury, by its Financial Crimes Enforcement Network issued an Interim Final Rule, amending 31 CFR Part 103, to implement of the anti-money laundering provisions of the USA Patriot Act. The Act requires every financial institution to establish an anti-money laundering program. "Persons involved (in) real estate closings and settlements", and certain other persons and types of businesses, are temporarily exempted from these requirements pending further review of the extent to which such businesses may be used by money launderers or terrorist financiers. The Treasury Department anticipates issuing regulations concerning these now exempted categories no later than October 24, 2002.

Michael J. Berey, Senior Underwriting Counsel
No. 43, May 28, 2002 (mberey@firstam.com)