First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

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

Acknowledgments - The uniform forms for taking and acknowledgment and for the proof of execution by a subscribing witness, when taken outside of New York State, are set forth in Real Property Law Section 309-b. Chapter 609 of the Laws of 2002 amended that Section effective January 1, 2003 to provide that "(t)he inclusion within the body (other than the jurat) of a certificate of acknowledgment or proof…of the city or other political subdivision and the state or country or other place the acknowledgement was taken shall be deemed a non-substantial variance" from the statutory forms.

Bankruptcy – The Debtor occupied a condominium apartment as a non-purchasing tenant under a non-eviction condominium conversion plan. The trustee in bankruptcy applied for authority under Bankruptcy Code to sell the unit to the Debtor's landlord. The United State District Court, Southern District of New York, granted the application, holding that the Debtor's occupancy rights were property of the estate under Code Section 541 and were subject to sale. The Court ordered the Debtor to turn over occupancy to the Trustee. In Re Carl Stein was reported in the New York Law Journal on September 13, 2002.

Carbon Monoxide Detectors - Chapter 257 of the Laws of 2002 adds subdivision 5-a to Section 378 of the Executive Law which provides that every one or two-family dwelling, condominium or cooperative unit constructed or offered for sale after November 28, 2002 shall have installed a operable carbon monoxide detector.

Contracts of Sale/Liquidated Damages - A contract for the sale of a cooperative unit provided that the seller could retain the contract deposit on the buyer's default as liquidated damages. The Supreme Court, New York County concluded that the rights of the parties were governed by the Uniform Commercial Code, and UCC Section 718 (1) allows a contract to provide for liquidated damages in an amount "reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proving loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy". It upheld the contract's 10% liquidated damages provision as not being unreasonable and granted summary judgment to the seller. Amato v. Hird was reported in the New York Law Journal on September 11, 2002.

Due Process – The City of New York was served as a party defendant in an action to foreclose a mortgage on property in Queens County. While the action was pending the City demolished the building on the property without giving the foreclosing mortgagee any notice of its intention to do so. In an action commenced to recover damages for the wrongful demolition of the building, the Supreme Court, Queens County, granted the City's motion for summary judgment dismissing the complaint. The Appellate Division, Second Department, reversed and remanded the case for a trial on the issue of damages. It held that it is a violation of due process to demolish a building without giving notice and an opportunity to be heard to a party with a valid interest in the property. Here the City had knowledge of the mortgage, and there was no indication in the record that the building posed an immediate danger to the community. Home Doc Corp. v. City of New York, decided August 5, 2002, is reported at 746 NYS 2d 42.

Easements - The Supreme Court, New York County, held that a lessor of real property, here a cooperative corporation, could establish an easement by prescription over space it had leased within the building it owned. In this case, the cooperative corporation had for 21 years used basement space, which was part of a lease for operation of a garage, for the storage and removal of compacted garbage generated by residential occupants of the building. The tenant's action for damages for trespass and an injunction was dismissed. Saxon Garage Corp. V. Regency East Apartment Corp. was reported in the New York Law Journal on September 25, 2002.

Franchise Tax - A domestic corporation was the record owner of real property since 1974. It was dissolved by proclamation by the Secretary of State in 1979. The Technical Services Division of the New York State Department of Taxation and Finance concluded in an Advisory Opinion issued September 13, 2002 that the corporation had since 1979 been acting only as nominee for the benefit of the partnership that held itself out as owning the property. The corporation had not been conducting business in the state and it was not subject to tax under Tax Law Article 9-A from the date of dissolution. TSB-A-02 (15)(C) is on the Internet at http://www.tax.state.ny.us/pdf/Advisory_Opinions/Corporation/A02_15c.pdf.

Mortgage Foreclosure - After entry of a judgment of foreclosure and sale, the mortgagor filed bankruptcy petitions three times to stay scheduled foreclosure sales. A fourth foreclosure sale was scheduled, and the defendant-mortgagor moved to stay the sale. The Supreme Court, Kings County allowed the sale to proceed but stayed transfer of the Referee's deed to the successful bidder (the mortgagee) as the parties entered into a stipulation extending her right to redeem. In an Order to Show Cause filed prior to the date on which the defendant could redeem but returnable after that date, the defendant sought to compel the mortgagee to accept a payoff. The Court stayed all proceedings to preserve the defendant's right to

redeem, and ordered the mortgagee to accept payment of the mortgage debt and costs. In reversing that decision, the Appellate Division, Second Department, held the Supreme Court did not have the authority to extend the agreed upon redemption date. RPAPL Section 1341 ("Payment into court of amount due") only preserves the right to redeem until the foreclosure sale. EMC Mortgage Corporation v. Bobb, decided July 15, 2002, is reported at 745 NYS 2d 204.

Mortgage Foreclosure – In 1992, the mortgagor defaulted in payment of indebtedness secured by two mortgages on her property. The first mortgage was foreclosed and in July 1995 surplus money was deposited with the Suffolk County Treasurer. In August 2000 the second mortgagee moved to obtain the surplus money since its lien exceeded the amount of the surplus funds. The mortgagor opposed the motion and asserted a claim to the surplus money as owner of the equity of redemption. According to the Appellate Division, Second Department, reversing the decision of the Supreme Court, Suffolk County, directing that the surplus money be distributed to the mortgagor, since the lender moved to obtain the surplus money more than six years after the default on the second mortgage, its claim was time barred under CPLR Section 213(4) ("Actions to be commenced within six years") which provides that an action on a bond, note or mortgage, or any interest therein, must be commenced within six years. The borrower was therefore entitled to the surplus money. Greenpoint Savings Bank v. Kijik, decided August 26, 2002, is reported at 746 NYS 2d 600.

Mortgage Foreclosure - RPAPL Section 1371(2) requires that a motion for a deficiency judgment be made within 90 days of the delivery of the foreclosure sale deed or the proceeds of the sale will be deemed to be in full satisfaction of the mortgage debt. In this case, the Supreme Court, Nassau County, denied the plaintiff's application for a deficiency judgment made more than 90 days after the deed's delivery, notwithstanding that the deed was held in escrow first by the Referee and then by the title insurance agent. It was escrowed pending receipt of executed transfer documents, transfer fees and recording charges, not payment of the purchase price. Arbor National Commercial Mortgage v. Carmans Plaza was reported in the New York Law Journal on October 8, 2002.

Mortgage Foreclosure - A mortgage on the primary residence of a litigant in a matrimonial action given to his or her attorney to secure the payment of legal fees incurred in that action cannot be foreclosed pursuant to Chapter 71 of the Laws of 2002, enacted May 21, 2002. The New York Law Journal reported on October 2 that the Supreme Court, Albany County, in Schantz v. O'Sullivan, has upheld the constitutionality of that statute.

Mortgage Foreclosure/Reforeclosure – The purchaser at the foreclosure sale of a building in Manhattan, formerly owned by a cooperative corporation, commenced an action to reforeclose the mortgage under RPAPL Section 1523(4) ("Judgment of foreclosure in certain cases") in order to terminate the interests of proprietary

lessees not named as parties defendant in the foreclosure. The Appellate Division, First Department, held that during the reforeclosure (i) the tenants are to pay for use and occupancy under RPL Section 220 ("Action for use and occupation"), (ii) the amount charged for use and occupancy would be the amount of the established maintenance charges (and not be based on fair market rentals), (iii) the proprietary leases would be the effective rental agreements, and (iv) and increases in maintenance charges would be permitted consistent with rent stabilization guidelines. Davis v. Cole was reported in the New York Law Journal on September 18, 2002.

New York City Recordings - Effective January 2, 2003, the City Register's offices will only accept for recording only documents submitted using its new Internet-based Automated City Register Information System ("ACRIS"). ACRIS mandates the on-line preparation of a Cover Page (sometimes referred to as an Endorsement Page) at the Department of Finance's WEB Site for each document to be recorded. In addition, on January 2, indexes for recorded documents and images of recorded documents from 1966 will be viewable on-line for New York County, and indexes from 1982 to date will be accessible for Kings, Queens and Bronx Counties. Later in 2003, indexes and documents back to 1966 will be available on the Internet for those three counties. Search results and documents will be printable from any computer without charge, except that images printed at terminals in the Register's offices will cost .25 cents per page.

Also, later in 2003, transfer tax returns (the State's Form TP-584 and the NYC-RPT) and the Real Property Transfer Tax Report ("RP-5217") (commonly known as the Equalization and Assessment Form, to be required in New York City as of January 1, 2003) will be completed on-line. Signature pages to the forms will be submitted with the document being recorded, and payment of the taxes and recording charges. All documents submitted for recording will be imaged promptly after submission to enable them to be viewed on the Internet.

Indexes and images of financing statements and federal liens filed with the offices of the City Register will also be available on-line, including financing statement filed only by name prior to July 1, 2001, the effective date of Revised Article 9 of the Uniform Commercial Code. After July 1, 2001, only real estate related financing statements are filed in county recording offices.

New York City Real Property Transfer Tax ("RPTT") – The Department of Finance's Audit Division has issued a Statement of Audit Procedure for "Audits of Purported 'Dummy/Strawman' Transfers in Connection with Real Estate Syndications". The Procedure provides guidance to auditors in the RPTT Unit reviewing transfers claiming exemption from tax when property is transferred on completion of a syndication from an entity holding title as nominee to its owner/principal. The Auditor is directed to request if not submitted with Form RPTT, among other things, a copy of the nominee or agency agreement and the

private placement or public offering materials sent to prospective investors. The nominee or agency agreement should by its terms terminate, and title should transfer to the owner/principal not subject to any indebtedness, within one year of the date on which the nominee acquires the property. Audit Procedure 02-2-RPTT, issued June 26, 2002, is at http://nyc.gov/html/dof/pdf/01pdf/rptt_syndication.pdf.

Notice of Pendency - The Appellate Division, First Department, reversed an Order of the Supreme Court, Bronx County, which granted plaintiff's motion for summary judgment in its action to foreclose a mortgage, and granted the defendant's motion to dismiss the complaint. A prior foreclosure of that mortgage had been commenced; however, the action did not proceed to judgment and the notice of pendency expired. According to the Appellate Division, the filing of a second notice of pendency was a nullity since the plaintiff allowed the lis pendens in the prior action to expire. Campbell v. Smith, decided September 12, 2002, is reported at 747 NYS2d 18.

As noted by the Supreme Court, Nassau County, in Queens County Savings Bank v. Spinella, this is not the position taken in the Second Department. In this case, reported in the New York Law Journal on November 5, 2002, the lis pendens filed under the CPLR in an action to foreclose a mortgage foreclosure expired and the court denied a motion to extend the notice of pendency. It granted, however, the plaintiff's motion for summary judgment on the condition that it file prior to entry of a final judgment the notice of pendency required by RPAPL Section 1331 to be filed in a foreclosure action at least 20 days prior to entry of final judgment.

"Talkline-The Stoler Report" - The radio talk show hosted by First American Vice-President Michael Stoler returns for its second season starting December 4 from 9 to 10 PM on radio station WSNR 620 AM. Discussing "The Future of Downtown Manhattan" with Michael's on December 4 will be Carl Weisbrod, President, Alliance for Downtown New York, Jonathan Fair, Executive Vice-President, New York City Economic Development Corporation, Ross Moskowitz, Senior Partner, Stroock & Stroock & Lavan LLP, and Charles Gargano, Chairman, Empire State Development Corporation. On December 11 Michael and his guests will discuss "The Real Estate Investment Banker's Perspective on Financing". On December 18 the topic will be "The State of Affordable Housing in New York". For further information contact Michael Stoler at mstoler@firstam.com.

Tax Sales - Petitioner, a mortgagee assignee, commenced an Article 78 proceeding against the City of Rochester to have a tax deed set aside on the ground that it did not receive notice of the tax sale due to the assignment having been incorrectly indexed by the County Clerk. Notice was sent instead to the original mortgagee. The County Clerk having appeared in the action, the Supreme Court, Monroe County, ordered the proceeding converted into a money action against the County Clerk under RPL Section 316 ("Indexes") and dismissed the action against the City of

Rochester. There was no allegation that the City had actual notice of the assignee's interest. Matter of the Application of American Financial Corp. of Tampa v. City of Rochester and County Clerk of Monroe County, decided September 23, 2002, is reported at 2002 N.Y. Misc. LEXIS 1344.

Tax Sales – The Village of Great Neck's tax opted out of the new Uniform Delinquent Tax Enforcement Act (RPTL Article 11) and passed a Local Law continuing the procedures under former RPTL Article 14. The Appellate Division, Second Department, held that the Village's Local Law violated due process requirements and was unconstitutional insofar as it authorizes the sale of a tax lien after notice only by publication. The holder of the mortgage on the property by a recorded assignment should have received notice by mail or by personal service. The tax sale deed issued to the purchaser at the tax sale was held void and ordered vacated. Kahen-Kashi v. Risman was reported in the New York Law Journal on September 18, 2002.

Transfer Taxes – An Advisory Opinion issued on September 18, 2002 by the Technical Services Division of the New York State Department of Taxation and Finance deals with the assignment of a leasehold with the overall purchase price for the Seller's assets also including amounts for leasehold improvements and the sale of goodwill. The Opinion concludes that in calculating the state's Real Property Transfer Tax for the assignment of the lease, the overall consideration needs to be apportioned between the value of the leasehold estate and the value of the Seller's other assets. To determine the fair market value of the leasehold interest, the Lease is valued at the present (discounted) worth of the difference between the fair market rental value and the actual rent payable under the Lease, as the contract rent was less than the current market rent. The fair market value of the Leasehold is to be increased by the fair market value of the leasehold improvements. TSB-A-02(5) R is at http://www.tax.state.ny.us/pdf/Advisory_Opinions/Real_Estate/A02_5r.pdf.

Transfer Taxes – "Tax Aggregation Rules: Traps for the Unwary", by Michael J. Berey of First American, was published in the "Real Estate & Title Insurance Trends" section of the New York Law Journal on September 30, 2002. See http://www.titlelaw-newyork.com/Mans/Tax%20Aggregation%20Rules%20.pdf.

Uniform Commercial Code - Effective November 15, 2002, each financing statement filed in the Department of State will be stamped with a 15-digit file number which number will be required on all further related filings. The 15-digit number will incorporate the filing date. Amendments to initial financing statements filed with the Department of State prior to November 15 should continue to list both the 6-digit file number and the filing date.

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No. 46, November 15, 2002 (mberey@firstam.com)