First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

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

Carbon Monoxide Detectors – Chapter 257 of the Laws of 2002, adding subdivision 5-A to Section 378 of the Executive Law, provides that every one-or-two family dwelling, including condominium and cooperative units, constructed or offered for sale after November 28, 2002 is required to have an operable carbon monoxide detector. Under Chapter 257, standards for the design, manufacture and installation of carbon monoxide detectors are to be established by the State Fire Prevention and Building Code Council. New York's Department of State has taken the position that "the legal requirement to install a carbon monoxide detector will become effective only after final adoption of the new regulation by the Code Council". It is anticipated that the Council will adopt a regulation in March, which would become effective in July 90 days after notice of its adoption is published. For the text of the proposed Rule click on Carbon Monoxide Detectors.

Contracts of Sale – The Supreme Court, New York County ordered a contract for the sale of a condominium unit at Battery Park City canceled and the seller-defendant to return the contract down payment. Due to the events of September 11 access to the apartment was restricted and, once access was permitted, the apartment and personal property therein had to be cleaned. However, the seller did not provide a notice in writing to the plaintiff-buyer by the earlier of the date of closing or the tenth date after the loss or damage, as required by the contract, as to whether she elected to repair or restore the apartment and personal property in the unit and as to the adjourned closing date. (The seller's attorney attempted to set a closing date by a letter dated November 20, 2001 sent to the buyer's attorney.) It was not impossible for the seller to comply with the contract provision. Siegel v. Luk was reported in the New York Law Journal on January 2, 2003.

Mortgage Foreclosure –The Supreme Court, Kings County, dismissed an action to foreclose a consolidated mortgage due to the mortgagee's failure to comply with a requirement of the first mortgage that notice and an opportunity to cure a default were to be provided the defendants prior to acceleration of the debt and commencement of a foreclosure. Although this requirement was not contained in the later executed second mortgage or the consolidation agreement, it was not expressly modified by the terms of the consolidation agreement and it, therefore, remained in effect. First Commercial Mortgage Company v. Frazier was reported in the New York Law Journal on January 7, 2003.

Mortgage Recording Tax – In an Advisory Opinion regarding the Hunters Point (Queens West) Waterfront Development Use Improvement Project, the Technical Services Division of the New York State Department of Taxation and Finance has taken the position that a mortgage made to either the New York State Development Corporation dba Empire State Development Corporation or its subsidiary, the Queens West Development Corporation ("QWDC"), as mortgagee (whether as trustee, agent, nominee or otherwise), or as a co-mortgagee with a private entity, is exempt from mortgage recording tax so long as the UDC or the QWDC presents the mortgage for recording, notwithstanding that the mortgage will be funded by private entities to which it is assigned. In addition, so long as the mortgage continues to secure the same principal indebtedness, the recording of any supplemental instrument will be exempt from mortgage recording tax. Advisory Opinion TSB-A-02(6)R (Petition No. M021025A), issued December 13, 2002, is on the WEB at http://www.tax.state.ny.us/pdf/Advisory_Opinions/Mortgage/A02_6r.pdf.

Party Walls – Two buildings in lower Manhattan share a party wall under an agreement executed in 1868, which provided that each adjoining owner could use the wall for the support of his or her building. The buildings are now of differing elevations due to the demolition of the plaintiff's building above the second story years ago following a fire, leaving exposed the upper northerly face of the part of the party wall which is on the plaintiff's property. The issue presented was whether the defendant-adjoining owner has a right to exercise any control over that exposed northerly face of the party wall. The Appellate Division, First Department, held that the defendant has no rights beyond having an easement for the support of her own building. The defendant's use of the plaintiff's wall space for advertising is a trespass as a matter of law and the defendant was permanently enjoined from using, and authorizing others to use, for the display of advertisements, any part of the party wall that is on the plaintiff's side of the property line. In addition, the plaintiff was held to be entitled to all licensing fees the defendant received from the company that posted advertising on that wall space. Sakele Brothers LLC v. Safdie was reported in the New York Law Journal on December 30, 2002.

Property Condition Disclosure Act – An action was commenced by the buyers of residential property in Staten Island claiming that they closed their purchase in reliance on a Disclosure Statement that inaccurately reported the condition of a swimming pool and deck. The Disclosure Statement, required by the Property Condition Disclosure Act (Real Property Law Section 462), effective March 1, 2002, applies to the sale of real property improved by a one-to-four family dwelling used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of one or more persons. The Civil Court, Richmond County, dismissed the case on the grounds that no cause of action is created by the Act; the only remedy is to provide for a credit of $500 at closing if the seller does not provide a Disclosure Statement. There is no remedy under the Act if it is established that a seller does not disclose facts about which it has actual knowledge. The Court further held that any information contained in the Disclosure Statement merges into the contract of sale and into the deed at closing. Since the plaintiffs were unable to prove that the

defendants had either actual or constructive knowledge of the property defects, they had also had no remedy at common law. Malach v. Chuang was reported in the New York Law Journal on January 10, 2003.

Special Purpose Entities – The Financial Accounting Standards Board has issued Interpretation No. 46 in its Financial Accounting Series, which is titled "Consolidation of Variable Interest Entities". According to the Interpretation No. 46, it "clarifies the application of Accounting Research Bulletin No. 51, *Consolidated Financial Statements*, to certain entities in which equity investors do not have the characteristics of a controlling financial interest or do not have sufficient equity at risk for the entity to finance its activities without additional subordinated financial support from other parties". It states, "(t)he objective of this Interpretation is not to restrict the use of variable interest entities but to improve financial reporting by enterprises involved with variable interest entities". Interpretation No. 46 applies to (i) variable interest entities created after January 31, 2003, (ii) to variable interest entities in which an enterprise obtains an interest after January 31, 2003, and (iii) in the first fiscal year or interim period after June 15, 2003 to variable interest entities in which an enterprise holds a variable interest that it acquired before February 1, 2003. For the text of Interpretation No. 46 click on FASB.

Statute of Limitations (Extension Under Bankruptcy Code) - The Appellate Division, Second Department, reversing the decision of the Supreme Court, Nassau County, dismissed an action to foreclose a mortgage commenced in 2000 by a trustee in bankruptcy. Under the mortgage, the entire debt was to be paid by November 1, 1992. Under CPLR Section 213(4), this would have allowed mortgagee to start the action prior to November 1, 1998. Bankruptcy Code Section 108(a) provides that if the period within which the debtor could commence an action has not run before the filing of the bankruptcy petition the bankruptcy trustee's time to commence the action is extended until the latter of the expiration of the statute of limitations or "two years after the order for relief". However, the bankruptcy petition (the filing of which constitutes an order for relief under 11 USC Section 301) was filed in 1993. Zinker v. Makler, decided October 21, 2002, is reported at 748 N.Y.S. 2d 780.

"Talkline-The Stoler Report" – The radio talk show hosted by First American Vice-President Michael Stoler is broadcast each Wednesday in January at 9PM on WSNR 620 AM. The topic on January 29 is "The Outlook for the Hospitality Industry in Metro New York for 2003". Joining Michael Stoler will be Patrick Denihan, Executive Managing Director & Principal, Manhattan East Suite Hotels, Henry Kallan, Principal, the Elysee, The Library, the Casablanca and the Girafee Hotels, Andrew H. Levy, Partner, Gibson, Dunn & Crutcher, and Marc S. Gordon, Partner, NorthStar Capital Investment Group. The program on February 5 will be on "Affordable Residential Housing in the City of New York", and the program on February 12 will be on "The Senior Real Estate Lenders Perspective on Financing and Structuring Large Real Estate Transactions". For further program information contact Michael Stoler at mstoler@firstam.com.

Tax Sales – Prior to the County of Suffolk having taken title to property by a tax deed but after the tax sale the holder of a mortgage filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. The County subsequently conveyed the property to a bona fide purchaser (which transferred title to the defendant in this action). In an action to foreclose brought by the mortgagee's trustee in bankruptcy, the Supreme Court, Suffolk County, denying the defendant's motion for summary judgment, held that the transfer of title to the County violated the automatic stay and did not impair the lien of the mortgage. The mortgagee's right to redeem the tax lien was an asset of the Debtor's estate and was protected by the automatic stay under Bankruptcy Code Section 362(a). Zinker v. Town of Islip Housing Authority was reported in the New York Law Journal on December 11, 2002.

Title Insurance – The Supreme Court, Westchester County, entered a judgment canceling and discharging of record a mortgage (the "First Mortgage"). The judgment was appealed and reversed by the Appellate Division, Second Department. In the interim, however, the owner of the mortgaged premises conveyed to the defendant who obtained a mortgage (the "Second Mortgage") from a different lender. A title insurer relying on the judgment insured the Second Mortgage as a first lien. In an action to foreclose the First Mortgage, the Supreme Court held that the First Mortgage had priority. The Appellate Division affirmed on the grounds that the First Mortgagee would have no effective remedy if it lost its lien priority. The Second Mortgagee has a remedy against its title insurer. The Appellate Division noted with approval that the First Mortgagee had moved in the Supreme Court for a court-ordered stay of enforcement of the judgment pending appeal but the motion was denied.

The Court distinguished this case from the 1990 decision in Da Silva v. Musso (76 N.Y. 2d 436), in which the Court of Appeals held that the good faith of a purchaser who acquires property for value during the pendency of an appeal, where there is no stay of cancellation of the lis pendens, is not affected by the purchaser's actual knowledge of the appeal. According to this Court, the Court of Appeals in Da Silva considered whether there was an alternative remedy for the purchaser if the sale to it was overturned. Here, according to the Court, the first mortgagee would otherwise have no remedy, and the second mortgagee was protected by title insurance. Marcus Dairy, Inc. v. Jacene Realty Corp., decided October 7, 2002, is reported at 751 N.Y.S. 2d 237; 2002 N.Y. App. Div. LEXIS 9455.

Truth in Lending Act (15 U.S.C. Section 1601 et seq.) – The United States District Court for the Southern District of New York, in Pechinski v. Astoria Federal Savings and Loan Association, considered whether a fee to assign a mortgage on the plaintiffs' residence, not included in the computation of the finance charge when the loan was made, violated the Act and implementing Regulation Z (collectively, the "TILA"). It held that a charge of $2,479 imposed for the assignment (.875% of the

outstanding balance of a mortgage loan) need not have been disclosed as part of the finance charge under the TILA since the fee was not imposed incident to, or as a condition of, the extension of credit. The Court also held that the charge was not a prepayment fee since it was not imposed "strictly because of the prepayment in full" of the loan. The Court declined jurisdiction over state law claims and dismissed the action for the failure to state a claim for relief. The case was reported in the New York Law Journal on January 14, 2003.

Uniform Commercial Code – The New York City Register's offices will no longer accept termination statements for financing statements filed against collateral other than fixtures and cooperative interests. It is the Register's position that the period under Revised Article 9 during which a non real estate-related financing statement could be transitioned by a further filing to the Department of State expired July 1, 2002. UCC Section 9-703 provides that a security interest perfected under former Article 9 remains effective only if it is perfected under revised Article 9 within one year of July 1, 2001 the effective date of Revised Article 9.

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