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CURRENT DEVELOPMENTS

This is another in a series of bulletins issued to clients of First American on cases, legislation and other matters of interest. A copy of any case noted below can be requested by email to Michael J. Berey, Senior Underwriting Counsel at MB@TheOffice.net or by contacting your account representative at 212-922-9700. Issues of “Current Developments” are available on the Internet at www.titlelaw-newyork.com.

Mortgage Recording Tax - Chapters 489 and 490 of the Laws of 1996, amended Tax Law Section 253-b effective November 6, 1996 to extend the benefits afforded to mortgages on one-to-six family, owner-occupied residential property to all “credit line mortgages” which secure a maximum principal indebtedness outstanding at any one time of less than \$3,000,000. No mortgage recording tax will be imposed on advances or readvances beyond the maximum principal amount secured so long as they are made to the original obligor(s) named in the primary mortgage.

Application of Section 253-b to commercial credit line mortgages has been discussed with the Technical Services Unit of the New York State Department of Taxation and Finance. While the positions taken by the Unit are, absent an advisory opinion or an opinion of the Department’s counsel, only informal and not binding, the following advice has been received.

First, an unsecured term loan of \$3,000,000 or more, whether or not in existence prior to November 6, 1996, can without mortgage recording tax being imposed on readvances be modified and split into two separate notes or amended to become two separate tranches in a loan facility, one being a newly secured revolving credit obligation for less than \$3,000,000 and the balance a unsecured or separately secured term loan.

Second, a single mortgage lien cannot secure both a credit line facility for less than \$3,000,000 and a term loan facility when they aggregate \$3,000,000 or more and receive the benefit of Section 253-b.

Third, the protection of the Section 253-b will not be afforded if an unsecured revolving credit facility of \$3,000,000 or more, entered into at any time, is modified such that only a less than \$3,000,000 identifiable portion of the overall credit line is later secured by a mortgage. Technical Service's conclusion is based on the definition of "credit line mortgage" in Tax Law Section 253-b (2) which would, it is believed, require taking into account the entire "credit agreement or other financing arrangement".

Lastly, for a so-called credit line mortgage recorded prior to November 6, 1996, the benefits of Section 253-b will not be available even if the mortgage is modified and severed to result in a credit line mortgage of less than \$3,000,000 under Chapter 490 of the Laws of 1996. In amending Section 253-b for commercial credit lines, Chapter 490 provides that the change applies "to all credit line mortgages recorded on or after" its effective date.

New York City Real Property Transfer Tax - As previously reported, the Tax Law and City's Administrative Code were amended effective August 28, 1997 to allow for the RPT a continuing lien deduction from consideration on the transfer of a one-to-three family house, an individual residential cooperative or condominium unit, or an economic interest in such property if the continuing lien existed before the date of transfer. The City's Department of Finance has advised that no continuing lien deduction will be allowed in the case of a transfer pursuant to a separation agreement or a divorce decree. In all instances consideration will be deemed to be the fair market value of the property transferred. The State has not taken this position on the continuing lien deduction for its Transfer Tax.

New York City Tax Lien Sales - The third phase of the 1997 tax lien sale involving a limited number of parcels has been rescheduled for April. A 1998 tax lien sale is anticipated to occur in June. An

article on the tax lien sale procedure is included in the Manuals and Publications section of Internet site <http://www.titlelaw-newyork.com>.

Cooperative Units - The Supreme Court, New York County in *Savasta v. Duffy*, reported in the New York Law Journal on March 20, 1998, has concluded that standards governing real estate contracts, and not Section 2-716 of the Uniform Commercial Code (“Buyer’s Right to Specific Performance or Replevin”), should govern application of the remedy of specific performance for a contract to sell a cooperative apartment. It also concluded that cooperative unit’s stock is personalty, subject to Code Section 2-718 (“Liquidation or Limitation of Damages; Deposits”) for determining if retention of the full contract deposit as liquidated damages is reasonable or an unenforceable penalty in light of the damage arising from the breach. Lastly, the court held that a notice of pendency is not properly filed in an action for specific performance of a contract to sell a cooperative unit.

Deficiency Judgments - The prior issue of this bulletin reported on the case of *Barclays Bank of New York, N. A. v. Strathmore Five Realty Co.* (1997 N.Y. App. Div. LEXIS 13074) in which the Appellate Division, Second Department held that the complaint in a foreclosure action cannot be amended after entry of the judgment of foreclosure and sale to enable recovery of a deficiency judgment against guarantors notwithstanding that they were party defendants in the action. A somewhat different position has been taken by that Department in *The Pines at Setauket, Inc. v. Retirement Management Group, Inc.*, reported at 1998 N.Y. App. Div. LEXIS 199, in which the foreclosing plaintiff was permitted to amend its judgment of foreclosure and sale to expressly provide for a deficiency judgment. The judgment in this case had provided that a deficiency judgment could be applied for against the named guarantors after sale. The court stated that the failure to expressly adjudicate that the guarantors would be liable for a deficiency was merely an inadvertent omission that did not cause undue prejudice.

March 24, 1998