First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

ACRIS E-Tax Forms – The preparation of transfer tax returns and related forms on the Internet to record a transfer of an interest in real property in Manhattan, Bronx, Kings or Queens Counties is now anticipated to be required in either late April or early May. New York City's Department of Finance intends to post a tutorial on the ACRIS Website this month. ACRIS is at http://www.nyc.gov/acris.

Contracts of Sale/Rights of First Refusal – The Trustees of an Elk Lodge ("Lodge") entered into a contract of sale without disclosing to the contract vendee an outstanding right of first refusal. The vendee, who knew about the preemptory right, refused to close until that interest was disposed of. The Lodge asserted that the plaintiff-vendee should have closed subject to the right of first refusal and without an abatement of the purchase price, but the vendee sued for the return of his down payment alleging that the Lodge could not deliver marketable title. The Supreme Court, Nassau County, dismissed the action, granted the seller's counterclaim that it should retain the down payment. The Court also dismissed the cross-claim of the holder of the right of first refusal to be awarded specific performance or damages since the contract of sale was "abandoned" before the right was exercised. The Appellate Division affirmed and held that the Lodge could keep the down payment. The Court of Appeals reversed, holding that the Lodge's failure to produce marketable title barred it from retaining the down payment. It also held that the holder of the right of first refusal could not exercise its right or recover damages. He was not ready, willing and able to complete the purchase and since the right could be invoked against any future prospective purchaser he had suffered no damages. Cipriano v. Glen Cove Lodge #1458, B.P.O.E. decided October 28, 2003, is reported at 769 N.Y.S. 2d 168.

Corporations – Business Corporation Law Section 909(a) requires shareholder approval of the "sale, lease, exchange or other disposition of all or substantially all of the assets of a corporation, if not made in the usual or regular course of business actually conducted by such corporation" (Emphasis added). In an action for specific performance of a contract for the sale of all of a corporation's real property, the Supreme Court, Bronx County, held that since the corporation was in the business of property management, the transfer of all of its real property was not within its regular course of business, notwithstanding that its certificate of incorporation provided that it was formed "to buy, sell, exchange, lease... improve, develop, repair, manage, maintain and operate real property..." .The contract of sale, absent approval of two-thirds of the corporation's shareholders, was therefore void. The motion for summary judgment dismissing the claim for specific performance was

granted. Edbar Corp. v. Sementilli was reported in the New York Law Journal on February 18, 2004.

Escrows – In connection with a sale of two cooperative apartments located in Manhattan, Sellers' counsel deposited the contract down payments aggregating $2,730,000 in a non-interest bearing IOLA account at a relatively small bank in Connecticut. The bank in which the deposits were to be made was identified in the contracts and the contracts provided that the Escrowee would be liable for only gross negligence or willful misconduct. Prior to closing, the bank failed and was put into FDIC receivership. Approximately two-third of the deposits, after application of FDIC insurance and the sale of bank assets, could not be recovered. Suit was brought against the attorney for the Sellers' claiming malpractice, gross negligence and breach of fiduciary duty. The Supreme Court, New York County, denying the defendant's motion to dismiss the malpractice claim, held that whether escrow monies exceeding the federally insured limit of $100,000 should have been deposited in that bank presented a viable claim for malpractice. The plaintiff was entitled to offer expert opinion that the attorney deviated from generally accepted standards for real estate counsel. Claims for gross negligence and for breach of fiduciary duty were dismissed. Bazinet v. Kluge, decided may 29, 2003, is reported at 764 N.Y.S. 2d 320.

Equitable Estoppel – Appellant paid off his mortgage, a satisfaction of the mortgage was recorded and the other original loan documents were returned to him. After he obtained a mortgage loan from another lender the first lender thereafter discovered that it had mistakenly credited its borrower's account instead of the mortgage loan with the payoff funds, and it sued to foreclose its mortgage. The Supreme Court, Orange County, dismissed the complaint "without prejudice" to commence a new foreclosure action if the mortgage remained in default. The Appellate Division, Second Department, reversed the lower court, and dismissed the complaint "with prejudice". Prior to closing on the second mortgage, the plaintiff had confirmed that its loan was satisfied. Since the appellant changed his position to his detriment in relying on that information, the plaintiff was equitably estopped from foreclosing it mortgage. The borrower should not be required to make payments on two mortgages. First Union National Bank v. Tecklenburg, decided December 15, 2003, is reported at 769 N.Y.S. 2d 573.

Lien Law – The New York Court of Appeals, affirming decisions of the lower courts previously reported in Current Developments, has held that the transfer to a construction lender, as assignee of the developer's interest in a turnkey contract with the NYC Housing Authority, of monies due the developer under that contract to reduce the amount owed under the building loan mortgage before payment of all laborers and materialmen was a diversion of trust assets under the Lien Law. The Court of Appeals indicated, as did the lower courts, that the mortgagee could have protected its position by filing a Notice of Lending under Lien Law Section 73. Aspro Mechanical Contracting, Inc. v. Fleet Bank, N.A., decided February 12, 2004, is posted at http://www.courts.state.ny.us/ctapps/decisions/feb04/7opn04.pdf

Mortgages – **A judgment creditor brought a special proceeding to determine ownership of a loft in Manhattan that had been conveyed by the judgment debtor to his ex-wife. The Appellate Division, First Department, reversing the decision of the Supreme Court, New York County, held that the deed to the wife was intended only as security in the event the husband-grantor defaulted on his obligations under their separation agreement. The husband therefore had title to the property. The deed was a mortgage that had to be foreclosed to extinguish the husband-mortgagor's interest in the property. His ownership interest was subject to the judgment. Leonia Bank v. Kouri was reported in the New York Law Journal on February 19, 2004.**

Mortgage Recording Tax - Effective March 1, 2004 the mortgage recording tax rate was increased in Westchester County (outside of the City of Yonkers) to $1.25 for each $100.00 secured; in the City of Yonkers the mortgage recording tax rate was increased to $1.75 for each $100.00 secured. The rate of mortgage recording tax on real property located, in whole or in part, in Seneca County was also increased effective February 1, 2004 to $1.00 for each $100.00 secured.

New York City – As reported in Current Developments dated April 12, 2002, the Supreme Court, New York County held in New York City Council v. City of New York (2002 N.Y. Misc. LEXIS 232) that the City's Uniform Land Use Review Procedure ("ULURP") was required prior to approval of an agreement entered into between the City, various railroad companies and private landowners providing for demolition of the "Highline" on the west side of Manhattan. The Court found that ULURP applies since the acquisition and extinguishment of the railroad easement over public space (two City owned properties, streets and sidewalks) is the "acquisition by the City of real property" and involves "a change in the City Map", which under City Charter Sections 197-c (a)(1) and (11) require a ULURP proceeding. This decision has been reversed by the Appellate Division, First Department, and the petition dismissed in a decision dated January 15, 2004. According to the Appellate Division, the surrender of the easements to the City was not the acquisition but an extinguishment of the easements, the transfer of the Highline structure was not an acquisition of real property but of personal property for purposes of ULURP, and private easements are not a proper subject for the City Map. The decision is reported at 770 N.Y.S. 2d 346.

New York City/Water Charges –The City's Water and Wastewater Rate Schedule for its 2000-2001 fiscal year imposed a surcharge of "100 percent of either the last annual un-metered water charge or the last annualized meter charge when a customer fails to install a meter or reading devise" by July 1, 2000. The surcharge was to "be applied from July 1, 2000 until the date of installation". The Supreme Court, New York County, held that the surcharge was not unconstitutional. The Court did not find that the imposition of a 100% surcharge "shocks the judicial conscience". Matter of 77 Realty LLC v. New York City Water Board was reported in the New York Law Journal on February 25, 2004.

Notice of Pendency – An action was commenced seeking the removal of a fence that the plaintiff claimed encroached on his property. The plaintiff filed a notice of pendency against the defendant's property; the defendant moved for an order canceling the lis pendens claiming the issue was merely about an encroachment. The motion was denied by the Supreme Court, Queens County. According to the Court, if the fence was on the plaintiff's property it could change the boundary line between the parties which would "affect the title to, or the possession, use or enjoyment of real property", grounds to file a notice of pendency under CPLR Section 6501. Ungureanu v. Battaglia was reported in the New York Law Journal on January 21, 2004.

Restrictive Covenants – Current Developments dated July 2, 2003 reported a decision of the Appellate Division, Second Department, in Chambers v. Old Stone Hill Road Associates (757 N.Y.S 2d 70) which affirmed an order of the Supreme Court, Westchester County, directing the removal of a wireless telecommunications service facility and enjoining the defendants from violating a restrictive covenant prohibiting "any building except detached residential dwelling houses each for the occupancy and use of one family" and "any trade or business whatsoever". According to the Appellate Division, the Telecommunications Act of 1996 does not preempt the enforcement of privately imposed restrictive covenants. This decision has been affirmed by the New York Court of Appeals in a decision issued February 24, 2004 reported at 2004 N.Y. LEXIS 227 and posted on the Court of Appeal's Website at http://www.courts.state.ny.us/ctapps/decisions/feb04/15opn04.pdf.

Sheriff Sales – The Supreme Court, Richmond County, upheld a Sheriff's sale of a partnership interest in an entity owning a cooperative apartment in which the successful bidders applied to their bid the amount of a judgment they held against the owner of the interest being sold. Although the Sheriff at an execution sale must sell the property for cash, as was provided in the notice of sale, and has no right to sell for credit, an exception is made when the bidder is a judgment creditor and the bid is in the amount of the judgment or less. The credit bid was "neither improper nor prejudicial to the substantial rights of any party". Richter v. Targee Street Internal Medicine Group PC was reported on January 30, 2004 in the New York Law Journal.

"The Stoler Report: Real Estate Trends in the Tri-State Region" – New York's only television talk show on real estate trends in the tri-state region, hosted by First American Vice President Michael Stoler, airs on CUNY TV, Channel 75. The program "Real Estate Leaders' Perspective in 2004", first broadcast on March 1, will be re-broadcast on March 10 at 11 PM, March 14 at 5 AM, March 16 at 12 midnight, March 18 at 2 AM, and March 23 at 5 AM. Michael Stoler's guests are Douglas Durst, Co-President, The Durst Organization, Michael Pomeranc, President, The Thompson Hotels, Chuck Rosenzweig, Managing Director, Greenwich Capital Financial, Stephen Siegel, Chairman, Global Resources, CB

Richard Ellis, and Ofer Yardeni, Managing Partner, Stonehedge Partners, Inc. Live broadcasts and later Webcasts of programs can be viewed at www.stolerreport.com.

Wetlands/Due Process – Affirming a Judgment entered by the Appellate Division, Third Department, the New York Court of Appeals held that actual notice to a landowner was not required before the State Department of Environmental Conservation "(DEC") designated its property as a wetland and placed it on a freshwater wetlands map. The DEC fulfilled due process requirements when it complied with the notice provisions of the Freshland Waters Act (Environmental Conservation Law, Article 24). The Act requires written notice of a public hearing and of the Order promulgating the final wetlands map to be provided to all potentially affected landowners who can be identified on the tax assessment rolls, and it also requires publication of notice of the public hearing and the Order. The owner of the property, charged with engaging in prohibited activities on his land without a permit, did not receive actual notice of the tentative map, the public hearing or the final map since his property was incorrectly shown on the tax map. However, according to the Court, the notice provisions of the ECL, as carried out by the DEC, were "reasonable in view of all the circumstances". Zaccaro v. Cahill, decided October 21, 2003, is reported at 100 N.Y. 2d 884.

Michael J. Berey
Senior Underwriting Counsel
No. 62, March 10, 2004
mberey@firstam.com