First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

Bankruptcy – A husband and wife owning property as tenants by the entirety entered into a contract of sale three days prior to the husband filing a Chapter 7 Bankruptcy. The Trustee did not assume the contract, which was therefore deemed rejected, and the Trustee contracted to sell the property to other purchasers. He commenced an adversary proceeding against the wife seeking authority under Code Section 363(h) ("Use, sale or lease of property") to sell the property free and clear of her interest. The United States Bankruptcy Court for the Eastern District of New York granted the Trustee's motion to sell the wife's interest in the property under Bankruptcy Code Section 363(h) and, in doing so, also denied the initial contract vendees' motion for permission to intervene. Since the obligations of the Debtor's wife under the contract, and her rights in the property, were not "severable" from those of her husband, the vendees' contract rights were not enforceable; they were unsecured creditors with only a claim for damages against the estate. The Court noted that the vendees would have had a right to pay the contract price and take title from the Trustee if they were in possession of the property under Code Section 365(i). O'Connell, as Trustee, vs. Prakope, decided December 2, 2004, is reported at 317 B.R. 593.

Condominiums – The Supreme Court, Westchester County, denied a motion for summary judgment declaring that parking spaces at a condominium were limited common elements that could not be rented or sold to persons not residing at the condominium. The Appellate Division, Second Department, affirmed, holding that the Board of Managers did not establish, as a matter of law, that this was prohibited by the condominium's governing documents or rules. Board of Managers of Stewart Place Condominium v. Bragato, decided February 28, 2005, is reported at 789 N.Y.S. 2d 907.

Condemnation – Notwithstanding that property being condemned by the Queens West Development Corporation was zoned for industrial use, the owners of certain of the parcels being condemned sought to have their awards determined based on residential use under a redevelopment plan. The Supreme Court, Queens County, granted the motions of the condemnor to exclude evidence of the value of the property under a theory of residential use. According to the Court, "a condemnee may not receive an enhanced value for its property where the enhancement is due to

the property's inclusion within a redevelopment plan". Matter of Queens West Development Corp. v. Hunters Point Waterfront Development Land Use Improvement Project was reported in the New York Law Journal on March 16, 2005.

Cooperatives - The contract of sale for a cooperative unit conditioned closing on the approval of the transfer by the cooperative corporation. The corporation approved the transaction, but it required the purchasers to escrow the equivalent of eighteen months of maintenance charges for a period of no less than eighteen months. The purchasers canceled the contract due to the failure of the corporation to unconditionally approve their application and sued for a return of their down-payment. The Supreme Court, Queens County, granted the plaintiffs' motion for summary judgment, ordered the down-payment to be returned, and declared that the contract was null and void. The requirement of an escrow was an "unforeseen and onerous condition" which "effectively eviscerated the corporation's consent". Sit v. Schnaps was reported in the New York Law Journal on February 23, 2005.

Escrows – Current Developments issued March 10, 2004 reported on the case of Bazinet v. Kluge, decided by the Supreme Court, New York County on May 29, 2003, and reported at 764 N.Y.S. 2d 320. In this case, counsel for the Sellers of two cooperative apartment units in Manhattan deposited the contract down-payments aggregating $2,730,000 in a non-interest bearing IOLA account at a relatively small bank in Connecticut which failed and was put into FDIC receivership. Approximately two-thirds of the deposits, after application of FDIC insurance and the sale of bank assets, could not be recovered. Suit was brought against the sellers' attorney claiming malpractice, gross negligence and breach of fiduciary duty. The Supreme Court denied the defendant's motion to dismiss the malpractice claim, holding that whether an escrow exceeding the federally insured limit should have been deposited in that bank presented a viable claim for malpractice. This ruling has been reversed by the Appellate Division, First Department, in its decision entered January 6, 2005 and reported at 2005 N.Y. App. Div. LEXIS 29. According to the appeals court, "(t)here is no requirement imposed by law that an attorney-escrow agent place escrow funds in an account fully insured by the FDIC".

Hart-Scott-Rodino – The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR"), Pub.L. No. 94-435, requires an "entity" or "person" (as defined in HSR) contemplating a merger or acquisition meeting certain "size-of-person" or "size of transaction" thresholds to notify the Federal Trade Commission and the Antitrust Division of the Department of Justice to enable them to conduct a pre-merger investigation of whether the transaction would violate antitrust laws. There is a waiting period before the merger or acquisition can take place. On March 8, 2005 the Federal Trade Commission's Premerger Notification Office published in the Federal Register at 70 FR 11502 a Final Rule amending the HSR regulations effective April 7, 2005 to expand the notification requirements to transactions

involving the acquisition of a controlling interest in a partnership, limited liability company or other unincorporated entity when the reporting thresholds are met.

Mortgage Escrow Accounts – New York's General Obligations Law Section 5-601 requires "mortgage investing institutions" to pay interest on mortgage escrow accounts. A regulation issued by the Office of Thrift Supervision ("OTS"), United States Treasury Department (48Fed.Reg. 23032, 23039 (May 23, 1983)) provides that whether a federal savings association is required to pay interest on a mortgage escrow account is to be governed by the loan contract. The federal District Court, Southern District of New York, held that federal law preempted the New York statute and federal savings associations are not required to pay interest on mortgage escrow accounts. The United States Court of Appeals for the Second Circuit affirmed, finding that the OTS regulation was not arbitrary or unreasonable and was within the power granted to it by the Home Owners Loan Act ("HOLA") (12 U.S.C. Section 1461, et. seq). RESPA does not supersede HOLA and prevent the OTS from asserting regulatory authority over federal savings associations in connection with escrow accounts. Flagg v. Yonkers Savings and Loan Association, FA, decided January 21, 2005, is reported at 396 F.3d 178.

Mortgage Foreclosure – The Supreme Court, Nassau County, denied a motion to confirm a foreclosure sale and granted the motion of the owner of the home being foreclosed to void the sale, finding that the defendant was allowed by representatives of the lender to believe that the foreclosure sale would be canceled or postponed pending modification of the mortgage loan. The Court relied, in part, on the notes of telephone calls and other conversations with the mortgagor kept by the lender's representatives. The mortgagor claimed that she did not receive the package of loan modification documents that was sent to her. Fleet Bank v. Galati was reported in the New York Law Journal on March 23, 2005.

Mortgage Prepayments – A Class Action was brought alleging that the defendant lenders, in requiring the payment of certain charges in connection with the prepayment of mortgage loans, violated the federal Truth in Lending Act ("TILA"), the Real Estate Settlement Procedures Act ("RESPA"), and the Fair Debt Collection Practices Act ("FDCPA"). Among the fees in question, notice of which was not provided in loan agreements, were a document preparation fee, a facsimile fee, and a recording fee for the satisfaction of mortgage. The United States District Court for the Eastern District of New York, ruling on a motion by the defendant lenders to dismiss the federal claims for the failure to state a cause of action, held that the plaintiffs stated a cause of action for violation of the TILA, but it dismissed the claims made under RESPA and the FDCPA. The Court also agreed to exercise supplemental jurisdiction over the plaintiff's claims under New York law of breach of contract, unjust enrichment, and fraud, and under General Business Law Section

349 ("Deceptive acts and practices unlawful") and Real Property Actions and Proceedings Law Section 1921 ("Discharge of mortgages"). McAnaney v. Astoria Financial Corporation, decided February 17, 2005, is reported at 2005 U.S. LEXIS 2196.

Mortgage Recording Tax – The $.05 per $100 increase in the mortgage recording tax rates in the City of New York and in Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester counties, reported in Current Developments issued on March 30 as then pending, was enacted and is effective June 1, 2005. The effective date of the increase was initially April 14, but the date was extended by legislation signed on April 14. The New York State Department of Taxation and Finance, in an email issued to County Clerks on April 14, has advised that "to the extent mortgage recording taxes have been paid at the higher MCTD [Metropolitan Commuter Transportation District] rate for mortgages recorded prior to June 1, 2005, taxpayers may claim a refund by filing Form MT-15.1, "Mortgage Recording Tax Claim for Refund".

Mortgage Recording Tax/ACRIS – Prior to the increase in the tax rate effective June 1, mortgages securing less than $500,000 are subject to mortgage recording tax at the rate of $2.00 for each $100.00; mortgages on one-to-three family dwellings securing $500,000 or more are taxed at the rate of $2.125 for each $100.00; all other mortgages securing $500,000 or more are taxed at the rate of $2.75 per $100. Under a Regulation of the New York State Taxation and Finance published at 20 NYCRR 642.4, mortgages recorded in the City of New York which are part of the same or related transactions made by the same or related mortgagors are to be aggregated to determine the mortgage tax rate to be applied to each of the aggregated mortgages. When a mortgage is to be recorded, the Automated City Register Information System ("ACRIS") now requires the user to indicate if a mortgage has been recorded against the *same property* within the prior twelve months. If a mortgage was recorded and the aggregated mortgage amounts secure $500,000 or more, ACRIS will compute mortgage tax at the higher applicable rate.

The City Register has advised a committee of the New York State Land Title Association that ACRIS is being modified to require the user to indicate whether a mortgage executed by the same person or entity has been recorded *anywhere within the City* within the prior twelve months. Such mortgages will be aggregated and mortgage tax will be computed at the higher rate. The Register has indicated that her offices will not aggregate if an affidavit is provided stating that the earlier recorded mortgage has been paid off and the recording of a satisfaction is pending. However, the Register has also advised that if the parties to a mortgage being recorded claim that the mortgage, and another mortgage executed by the same person or entity recorded within the prior twelve months, are not part

of the same or related transaction, those mortgages will be aggregated and taxed at the higher rate. Form MT-15.1, "Mortgage Recording Tax Claim for Refund", will need to be submitted to the State Department of Taxation and Finance for a refund of the additional mortgage recording tax paid in such a case.

Real Estate Taxes/Bellmore School District (Nassau County) –The Town of Hempstead, on behalf of the Bellmore School District, has issued supplemental school tax bills to correct the undercharging of school taxes for 2004-2005. These supplemental amounts are payable without interest until May 10, 2005.

Real Estate Transfer Tax – Current Developments issued September 5, 2003 reported on the ruling of the New York State Division of Tax Appeals in The Matter of the Petition of the Ministry of Foreign Affairs of the Arab Republic of Egypt (DTA No. 818737), in which the Division upheld the ruling of an Administrative Law Judge denying the Ministry's claim for a refund of State Transfer Tax it paid on the sale of its diplomatic mission in Manhattan. The Petitioner is exempt from payment of the State Transfer Tax under the 1961 Vienna Convention on Diplomatic Relations, but the grantee is required by Tax Law Section 1401(a) to pay the tax when the grantor is exempt. However, as required by the contract of sale Petitioner paid the tax, under protest, to enable the deed to be recorded. The determination of the Administrative Law Judge has been affirmed, and the refund claim denied, in a Decision issued January 20, 2005 by the State's Tax Appeals Tribunal. According to the Tribunal, "the treaty does not affect petitioner's liability under the Tax law since it was the terms of the parties' contract that resulted in petitioner paying the transfer tax at issue". The Decision is on the Internet at http://www.nysdta.org/Decisions/818737.dec.htm.

"The Stoler Report: Real Estate Trends in the Tri-State Region" – New York's only television show on real estate trends in the tri-state region, hosted by First American Vice-President Michael Stoler, airs on CUNY TV, Channel 75. Rebroadcasts of "Residential Developments in the Tri-State Region-Industry Leaders' Perspective", first broadcast on March 28, are on April 17 at Midnight, April 19 at 5 AM, April 20 at 11 PM, and April 24 at 1 AM. Michael Stoler's guests are Michael Boxer, Partner, Ramius Capital Group, J. Christopher Daly, President, Sheldrake Organization, Daniel Gans, Principal, Hoboken Brownstone, Sam Giarrusso, Senior Vice-President, M&T Bank, Lloyd Goldman, President, BLDG Management Inc., and Yair Levy, President, YL Real Estate Development. WEB Casts are at http://www.stolerreport.com.

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