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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 item 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. Fax recipients can request future issues by email.**

**Condominium Common Charge Liens - The Court of Appeals has held that the commencement of a mortgage foreclosure against a unit owner does not toll the running of the six year lien period for the defendant condominium’s board’s filed lien for unpaid common charges. 2 No. 67 Chemical Bank v. Levine (Decided June 4, 1998).**

**Cooperative Converts to a Condominium - A cooperative building located at 30 West 90<sup>th</sup> Street in Manhattan is the first such entity in New York known to have been converted into condominiums. As reported in the New York Times, the move to convert was made because the building was “hamstrung” by the debt on the property, which made it difficult to refinance, especially with a large number of sponsor held units. As reported, the State Attorney General’s office indicates that a number of other cooperatives are also in the process of converting to condominiums. Contact Michael Alfieri at 212-850-1679 for further information.**

**Georgia - The statute governing who may act as a fiduciary in the State of Georgia has been amended effective July 1, 1998. Under O.C.G.A. Section 7-1-242, which provides that only certain types of entities can act as a fiduciary in Georgia, acting as a fiduciary is now specifically defined to include acting as a trustee and administering real or tangible personal property in Georgia. In addition, only banks “lawfully doing a banking business” in Georgia will be authorized to act as a fiduciary.**

**First American is inquiring as to whether a non-qualifying co-trustee may be used. Contact Thomas Sullivan at 212-850-1620 for further information.**

**Mortgage Foreclosure - The Legislature has passed and forwarded to the Governor for signature legislation effective on enactment permitting non-judicial foreclosure under a provision in a mortgage for foreclosure by power of sale. This new Article 14 of the Real Property Actions and Proceedings Law (“RPAPL”) is effective until July 1, 2001 and will apply to a non-judicial foreclosure for which a notice of pendency is filed on or before that date. The legislation provides, in part, for the following:**

**1. For a mortgage to be foreclosed under new Article 14, the mortgaged property may not be improved solely by a residential building containing less than six dwelling units, or be a residential condominium unit, a residential cooperative, or in the City of New York a building containing sixty-five percent or more residential tenancies. In addition, non-judicial foreclosure can not be used if the mortgagee intends to impair any residential tenancy in the building subject to the foreclosure.**

**2. A notice of pendency must be filed no later than ten days after commencing the non-judicial proceeding, and affidavits of service or the mailing of a notice of intention to foreclose must be filed prior to the date of sale with the clerk of the court. There must be publication of a notice of sale and sale must be by public auction.**

**3. On payment to the mortgagee of all sums due before commencement of the bidding at auction, the redeeming party may “require” the mortgagee to assign the debt and mortgage to any designated person or entity other than the mortgagor or its nominee. A Real Property Section 275 affidavit must be executed.**

**4. A sale may be set aside within one year after the recording of the foreclosure deed if there has been a substantial failure to comply with requirements as to notice, time, manner and publication of the sale**

which prejudiced a substantial right of a person or entity. A sale to a bond fide purchaser (other than the mortgagee or its nominee or assignee) without notice of any irregularity in the sale will not be set aside without restitution of the purchase price paid.

5. The mortgagor may by written notice to the mortgagee require that a mortgage executed prior to the effective date of this legislation, being foreclosed under this non-judicial procedure, be foreclosed judicially under RPAPL Article 13. If a non-judicial foreclosure is commenced to foreclose a mortgage, extension, amendment or consolidation executed after the effective date of this legislation, the mortgagor within forty days after receipt of the notice of intention to foreclose apply by order to show cause (which application must alleging certain facts, such as the mortgage not providing for non-judicial foreclosure by power of sale or that the mortgagor has a meritorious defense) to the Supreme Court in the county in which the property is located for an order directing that further proceedings be conducted pursuant to Article 13.

6. Procedures are set forth for application to be made to the Supreme Court of the county in which the property is located for appointment of a receiver and for a deficiency judgment. Contact Michael Berey for further information.

- Mortgage Foreclosure - The Appellate Division, Second Department has held that a lease executed by a mortgagor after entry of a judgment of foreclosure but prior to the foreclosure sale is a nullity. *Greenpoint Savings Bank v. Barbagallo*, 668 NYS 2d 678.

- The Appellate Division, First Department has held that absent a stay a good faith purchaser for value even with knowledge of the appeal of the foreclosure judgment is entitled to retain title purchased from the referee prior to reversal of the judgment. The foreclosing mortgagee is relegated to an action on the debt. *Aubrey Equities, Inc. v. Goldberg*, 668 NYS 2d 598.

- The Appellate Division, First Department has held that the statutory default rate of 9% applied post-judgment when the loan documents and judgement of foreclosure did not unequivocally provide that the loan

default rate of 24% applied until the judgment was satisfied. *Banque Nationale de Paris v. 1567 Broadway Ownership Associates*, 669 NYS 3d 568 (A.D. 1st Dept. 1998).

Mechanics Liens - A dissolved corporation could later file a notice of mechanics lien for work done prior to dissolution as part of the winding up of its affairs. The collection of its assets did not constitute the doing of new business. *Schenectady Municipal Housing Authority v. Keystone Metals Corporation*, 665 NYS 2d. 744 (A.D. 3rd Dept. 1997).

New York City Real Property Transfer Tax - The City's Department of Finance has issued "Draft Amendments" to the "Rules of the City of New York Relating to the Real Property Transfer Tax" concerning the mere change of identity or form of ownership exemption from tax. The conversion of a partnership to a limited liability company is not to be considered a transfer of real property or of an economic interest and the mere change exemption may not be afforded to a transfer which is part of a multi-step transaction in which beneficial interests are ultimately transferred. A copy of the draft can be obtained at <http://www.titlelaw-newyork.com> under Transfer Tax.

Sale-Leasebacks/Synthetic Leases - The Financial Accounting Standards Board's Emerging Issues Task Force has issued its bulletin No. 97-10 concerning the treatment for financial accounting of build-to-suit real estate projects where an entity that is involved with the construction of the project leases it upon completion of the construction. The changes are effective for (a) lease agreements or master lease agreements entered into after May 21, 1998 and (b) construction projects subject to existing lease agreements or master lease agreements unless (i) such projects have been committed to by both the lessee and lessor prior to May 21, 1998 or (ii) if a commitment does not exist for a project subject to an existing lease agreement or master lease agreement prior to May 21, 1998, construction on such project commences by November 21, 1999. A summary of EITF 97-10 written by Jack Murray of First American can be found at <http://www.titlelaw-newyork.com> under Manuals and Publications. Jack Murray can be contacted at 800-333-3993 for further information.

**Suffolk County/Transfer Tax - The Legislature has passed and forwarded to the Governor for signature legislation adding Section 64-e to the Town Law authorizing each town in the Peconic Bay Region (East Hampton, Riverhead, Shelter Island, Southampton and Southold) to establish by local law a Community Preservation Fund. Each town will also be authorized under a new Article 31-D of the Tax Law to impose by local law a transfer tax of two percent of consideration on the conveyance in that town of real property or an interest therein where the consideration exceeds \$500. All revenue from that tax will be deposited in the related Town's Community Preservation Fund. A partial exemption of consideration is to allowed depending on the town in which the property is located and whether the property is improved. A conveyances made pursuant to a contact executed prior to the enactment of such a local law will be not be subject to this new tax. Article 31-D will be in effect until December 31, 2010. Contact Ralph Vitolo at 516-727-5700 for further information.**

**June 24, 1998**