



**First American Title Insurance Company of New York  
CURRENT DEVELOPMENTS**

**Automated City Register Information System ("ACRIS")** – New York City's Department of Finance has announced that (i) documents to be recorded in Bronx, Kings or Queens Counties can be submitted at a Business Center in any of those counties, (ii) incomplete Cover Pages will be purged from ACRIS if not completed within 30 days, and completed Cover Pages will be purged from ACRIS if not submitted with payment within 90 days, (iii) incomplete E-Tax Forms will be purged from ACRIS if not completed within 45 days, and completed E-Tax Forms will be purged from ACRIS if not submitted attached to a cover page within 90 days, and (iv) ACRIS documents with the imprint of a fax number will be rejected. Fax information must be whited out before submission.

The ACRIS Home Page (<http://www.nyc.gov/html/dof/html/jump/acris.shtml>) includes a reminder that under revised Article 9 of the Uniform Commercial Code a UCC Cooperative Addendum or a UCC Continuation can be filed before July 1, 2006 to continue the effectiveness of a financing statement filed before that date under former Article 9 against a cooperative unit. It notes, however, that pending system updates ACRIS will now only reflect an expiration date of July 1, 2006 when a UCC Cooperative Addendum is filed. The proper filing of a UCC Cooperative Addendum will extend the effectiveness of a financing statement filed before July 1, 2006 for 50 years; filing only a UCC Continuation will extend the effectiveness of a filed financing statement for only 5 years. (Note that a UCC Amendment may also need to be filed with the Cooperative Addendum or Continuation). Contact Eva Marie Davis of Modern Abstract at 212-880-0720 for further information.

**Easements** – The Supreme Court, Kings County, had issued an Order requiring the Defendant to remove a chain link fence blocking the Plaintiff's access to an ingress and egress easement over Defendant's property, and the Defendant was permanently enjoined from interfering with the Plaintiff's use of such easement. Subsequent to the issuance of the injunction, Defendant constructed a cinder block building encroaching four inches onto the easement. The Supreme Court, Kings County, held the Defendant in civil contempt for violating the injunction and directed the Defendant to remove the portion of the building encroaching onto the easement "as quickly as is reasonably possible, but in any event no later than eight months from the date of notice of entry". Brooklyn Design Center LLC v. Nutica Ltd. was reported in the New York Law Journal on January 25, 2006.

**Equitable Subrogation** – The holder of a mortgage recorded in 1999 (the "1999 Mortgage") alleged that its lien was senior to a separate mortgage being foreclosed, which was recorded in 1998 (the "1998 Mortgage"). The holder of the 1999 Mortgage based its argument on the concept of equitable subordination, since the proceeds of the 1999 Mortgage were applied to pay off a mortgage recorded in 1996. The title insurance agent had not reported the 1998 Mortgage to the original holder of the 1999 Mortgage. The Supreme Court, Madison County, held that since the holder of the 1999 Mortgage had constructive notice of the 1998 Mortgage it could not have a first lien based on equitable subordination. According to the Court, equitable subordination applies "to prevent unknown, intervening mortgage holders from obtaining a windfall at the expense of a subsequent mortgagor that did not have notice of the earlier mortgage". *Green Tree Credit LLC v. Hopkins*, decided October 17, 2005, is reported at 2005 NY Slip Op 51720U, 9 Misc.3d 1122A and 2005 N.Y. Misc. LEXIS 2365.

**Mamaroneck, Westchester County** – New Section 106-49 of the Mamaroneck Town Code makes it illegal to occupy any building on property sold after January 1, 2006 in the unincorporated portion of the Town of Mamaroneck unless a Discharge Compliance Certificate is issued by the office of the Director of Building Code Enforcement and Land Use Administration. To obtain the Certificate, a licensed plumber must certify in writing to the Building Department that "the plumber has inspected all of the connections leading from the real property to the public storm water sewer lines and to the sanitary sewer lines and that all such connections comply with the requirements of the New York State Building Codes and the Town Code and has inspected the real property and found that there are no culverts, drains, hoses, leaders, lines, pipes or pumps that discharge liquids directly onto or directly toward a street, sidewalk or right-of-way". The Certificate may be obtained prior to the transfer of title but the Certificate will be valid only if the sale is completed within 60 days of the date on which the Certificate is issued. For further information, contact Antonio Vozza in First American's White Plains office at 914-428-3433.

**Mechanic Liens** – A Florida entity owning real property in New York City entered into a contract with the Plaintiff-subcontractor providing that the obligation to pay the subcontractor was contingent on payment being made to the general contractor and that on termination of the owner's contract with the general contractor the subcontract would be deemed terminated. The contract was governed by Florida law under which such a so-called "pay-when-paid" provision is enforceable. The Supreme Court, Queens County, in an action brought by the subcontractor to recover money allegedly due under the contract, dismissed the owner-Defendant's defenses that the pay-when-paid and the termination provisions of the contract relieved it of any obligation. Affirming the holding of the lower court, the Appellate Division, Second Department, held that a pay-when-paid provisions is void and unenforceable since it is contrary to public policy as set forth in Lien Law Section 34, which provides that "any contract, agreement, or understanding whereby the right to file or enforce any lien created under [Lien Law] article two is waived, shall

be void as against public policy and wholly unenforceable". *Welsbach Electric Corp. v. MasTec North America Inc.*, decided November 28, 2005, is reported at 804 N.Y.S.2d 805. (The Court noted that the Appellate Division, First Department, has held that a pay-when-paid provision is valid when parties choose to apply Florida law).

Mortgage Electronic Registration Systems, Inc. ("MERS") – Current Developments issued May 29, 2001 reported that the Suffolk County Clerk was not accepting mortgages executed to MERS as the mortgagee or as the mortgagee's nominee when MERS holds no legal interest in the mortgage. Current Developments issued July 9, 2004 reported that the Supreme Court, Suffolk County, held that the Suffolk County Clerk is required to record a mortgage executed to MERS as nominee for a named lender and to index such a mortgage under MERS "as nominee for lender". The Clerk was also directed to record discharges of such MERS mortgages so long as they were not assigned within MERS. The Appellate Division, Second Department, in a decision issued December 19, 2005, held that "the Clerk has a statutory duty that is ministerial in nature to record a written conveyance if it is duly acknowledged and accompanied by the proper fee... mortgages, assignments, and discharges which name MERS as the lender's nominee or the mortgagee of record are acceptable for recording". *Merscorp v. Romaine*, decided December 19, 2005, is reported at 2005 NY Slip Op 9728 and 2005 N.Y. App. Div. LEXIS 14360.

Mortgage Recording Tax and Real Estate Transfer Tax – The New York State Department of Taxation and Finance has advised that the per annum interest rates applicable for the first quarter of calendar year 2006 are 9% on the late payment of mortgage recording tax and real estate transfer tax and 6% on the refund of mortgage recording tax and real estate transfer tax, compounded daily. The interest rates are published on the Internet at [www.tax.state.ny.us/press/2005/int1105.htm](http://www.tax.state.ny.us/press/2005/int1105.htm).

New York City Economic Development Corporation ("EDC") – The EDC has formed the NYC Capital Resource Corporation ("CRC") to "make it easier for not-for-profit organizations to access tax exempt financing". According to a News Release issued January 10, 2006, the CRC will offer "direct loans through its Loan Enhanced Assistance Program (LEAP) to qualified borrowers that are expanding or improving services in New York City. The new program's simplified structure will expand the pool of organizations that can benefit from tax-exempt financing, especially arts and social service organizations and cultural healthcare and educational institutions. It will also be available to industrial companies". The News Release and accompanying Fact Sheet can be obtained at <http://www.titlelaw-newyork.com/Mans/EDC.pdf>. Contact Beth Kustina at EDC at 212-312-3595 or [LEAP@nycedc.com](mailto:LEAP@nycedc.com) for further information.

Practice of Law – Plaintiffs commenced a class action to recover for themselves, and for the other members of the class, a \$100 document preparation fee charged by Defendant, a subsidiary of a nationally chartered bank, for "fill in the blank" type documents. The Plaintiffs claimed that the charge represented the unlawful practice

of law. The Supreme Court, Nassau County, dismissed the complaint, holding that Judiciary Law Sections 478 ("Practicing or appearing as attorney-at-law without being admitted and registered") and 484 ("None but attorneys to practice in the state") restrict only the acts of "natural persons" and that there were no facts alleged from which the Court could infer that legal advice was afforded in violation of Section 495(3) ("Corporations and voluntary associations not to practice law"). In addition, the Court found that (i) "state laws or regulations which attempt to limit or restrict the fees a national bank may charge in connection with its banking activities are preempted by federal law and regulation", (ii) under 12 CFR Sections 7.4002(a) and (b) "national banks may assess such charges and fees as the bank determines is appropriate in accordance with 'safe and sound' banking principles", and (iii) charging a document preparation fee is a "safe and sound" business practice. *Fuchs v. Wachovia Mortgage Corporation*, decided November 15, 2005, is reported at 2005 NY Slip Op 51852U, 9 Misc.3d 1129A and 2005 N.Y. Misc. LEXIS 2545.

Privacy Act – The Gramm-Leach-Bliley Act (the "Act"), known also as the Financial Services Modernization Act of 1999, requires financial institutions to disclose to their clients their privacy policies and how they share information with affiliates and third parties. The Federal Trade Commission ("FTC") took the position that the Act's privacy regulations governing financial institutions were applicable to lawyers since "real estate settlement services" is a financial activity and lawyers engage in real estate settlement services.. Affirming the ruling of the United States District Court for the District of Columbia, the District of Columbia Circuit Court of Appeals held that the FTC's "attempt to regulate the practice of law under the Act fell outside its statutory authority". *American Bar Association v. Federal Trade Commission*, decided December 6, 2005, can be obtained at <http://pacer.cadc.uscourts.gov/common/opinions/200512.htm>.

Real Estate Taxes/New York City – Under Title 2-D ("Tax Exemption and Deferral of Tax Payments for Certain Industrial and Commercial Properties in a City of One Million of More Persons") of Article 4 of New York State's Real Property Tax Law and NYC Administrative Code Sections 11-256 through 11-267, real estate taxes on property in a "deferral area" that are attributable to increases in assessed value resulting from the making of physical improvements may be deferred for a period of seven years. The deferred taxes are payable without interest during the ten years beginning with the eleventh year of the deferral period. A conversion of property to residential use terminates these Industrial and Commercial Incentive Program ("ICIP") benefits and all deferred taxes are then immediately payable.

For the property in question, bills for real estate taxes due July 1, 2000 (the beginning of the tax year in which deferred taxes were to be first repaid) noted that an amount was "ICIP DEFERRED". However, when the property was converted to a residential condominium in 2001 the Sponsor did not advise the Department of Finance that the property was no longer eligible for ICIP benefits and the offering plan did not disclose either that the property had been receiving ICIP benefits or

that deferred taxes would be reinstated with interest. The unit owners and the sponsor brought an action to cancel the reinstatement of the deferred taxes, reimposed over a ten year period, the unit owners claiming that they purchased without notice that the deferred taxes would be reinstated. The Appellate Division, First Department, reversed the ruling of the Supreme Court, New York County, and granted the Department of Finance's motion for summary judgment, holding that the unit owners had constructive notice of the property's tax history. According to the Court, "a reasonable and prudent purchaser would have scrutinized the property's tax bills for the current year and years prior to the purchase date and would have seen the ICIP deferral notation [on the July 1, 2000 real estate tax bill] and investigated further". The Court also noted that the revocation of the ICIP was indicated on publicly available tax and assessment rolls. *7 Vestry LLC v. Department of Finance of the City of New York*, decided August 25, 2005, is reported at 800 N.Y.S.2d 398.

**Title Insurance/Refinance and Subordinate Mortgages/TIRSA Rate Manual Amendment** – Effective February 15, 2006, the Section of the Rate Manual of the Title Insurance Rate Service Association, Inc. ("TIRSA") dealing with the computation of the loan policy premium when insuring the refinance of an existing mortgage or a subordinate mortgage has been amended. The dollar amount applied to determine whether a 50% rate or a 70% rate is to be used in computing the title premium for a mortgage refinance or a subordinate mortgage has been increased from \$250,000 to \$475,000. In addition, no proof of prior insurance is required to afford a discounted premium when insuring a mortgage refinance or a subordinate mortgage eligible for a reduced rate. The amount eligible for the discounted premium may be determined in all instances from information available on the public record.

**Title Insurance/Reverse Mortgages/TIRSA Rate Manual Amendment** - Real Property Law Sections 280 and 280-a define a reverse mortgage loan as being "a loan which is secured by a first mortgage on real property improved by a one-to-four-family residence or condominium that is the residence of the mortgagor(s) the proceeds of which are advanced to the mortgagor(s) during the term of the loan in equal installments, in advances through a line of credit or otherwise, in lump sums, or through a combination thereof".

The TIRSA Rate Manual has been amended to set forth limits on loan policy amounts for Reverse Mortgages. Rate Manual Section 36 ("Loan Policy-Reverse Mortgages"), effective on February 15, 2006, will read as follows:

(A) A loan policy insuring a Reverse Mortgage (as identified in Sections 280 and 280-a of the Real Property Law) may not be issued in an amount less than the "Loan Amount" as shown on the HUD/VA Addendum to Uniform Residential Loan Application or the Direct Endorsement Approval for a HUD/VA-Insured Mortgage. In the event that neither the HUD/VA Addendum to Uniform Residential Loan Application or the

**Direct Endorsement Approval for a HUD/VA-Insured Mortgage are available, an amount equal to the "Loan Amount" as shown on the final loan application shall be used.**

**(B) Upon the request of the insured, the policy may be issued in an amount greater than the minimum amount of insurance set forth in (A) above, but: (i) no greater than the Maximum Claim Amount on Home Equity Conversion Mortgages (HECM), or (ii) in all other types of Reverse Mortgage Loans, no greater than the property's appraised value as used by the lender in connection with the making of the loan.**

**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. The program "Residential Developments - Condo Mania" first broadcast on January 30 will be re-broadcast on February 4 at 5 PM, February 5 at 8:30 PM, February 8 at 11 PM, February 11 at 4 PM, February 14 at 2 AM, February 18 at 2:30 PM, February 20 at 5 AM, and February 22 at 7AM, 1 PM and 11 PM. Michael Stoler's guests are Ziel Feldman, Principal, Property Markets Group, Ken Horn, President, Alchemy Properties, David Kramer, Partner, The Hudson Companies, David Lowenfeld, Executive Vice-President, World Wide Holdings, David Sigman, Senior Vice-President LCOR, and David Von Spreckelsen, Director of Acquisitions and Development, Toll Brothers. WEB Casts are at <http://www.stolerreport.com> and [www.cuny.tv](http://www.cuny.tv).

Michael Stoler will also be hosting a new half-hour talk show on CUNY-TV. "Building New York", which first broadcasts Monday, March 6, 2006, will be a weekly televised program on real estate in the New York City metropolitan area, featuring local and national leaders in real estate. Each weekly show will air on CUNY-TV Monday at 9 AM, 3 PM and 9 PM, Tuesday at 10:30 PM, Saturday at Midnight and Sunday at 10:30 AM. Programs will also be viewable on the Internet at [www.cuny.tv](http://www.cuny.tv) and [www.buildingny.org](http://www.buildingny.org). The first season of "Building New York" will air for thirteen weeks and include as guests John Catsimatidis, Chairman and CEO, Red Apple Companies, Lee Neibart, Senior Partner, Apollo Real Estate Advisors, William Rudin, President, Rudin Management, Larry Silverstein, Chairman, Silverstein Properties, Ofer Yardeni, co-Founder, Stonehenge Properties, Alan Suna, CEO, and Stuart Suna, President, Silvercup Studios, Norman Sturner and Neil Siderow, co-Founders, Murray Hill Properties, and Dale Hemmerdinger, Atco Properties and Management and Chairman, Citizens Budget Commission,

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