First American Title Insurance Company
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CURRENT DEVELOPMENTS

This is another in a series of bulletins issued to clients of First American. As issues are being sent by email only, other readers are requested to send their email addresses to Michael J. Berey, Senior Underwriting Counsel, at mberey@firstam.com. Issues of "Current Developments" are on the Internet at www.titlelaw-newyork.com.

Acknowledgments – Informal Opinion No. 2000-8 of the New York State Department of Law regarding acknowledgments was issued on May 31, 2000. First, all documents acknowledged in New York conveying an interest in real property situated in the state must use the new Uniform Form under Real Property Law ("RPL") Section 309-a. Second, documents that are not conveyances of real property required to be filed and signed on behalf of a corporation are to be acknowledged using the traditional form under RPL Section 309; such documents when signed by an individual or another entity, such as a written separation agreement or the transfer of an interest in a decedent's estate, must be acknowledged with the Uniform Form. In addition, documents conveying interests in New York real property acknowledged outside of the state may use either the Uniform Form for out of state acknowledgements under RPL Section 309-b or the form of acknowledgment used in the state where the document is acknowledged.

Condominiums –Real Property Law Section 339-kk provides that upon the non-payment of common charges by a non-occupying owner, all rental payments from the unit's tenant can be directed to be paid directly to the condominium association. However, according to the Supreme Court, Bronx County, that right, and a judgment obtained by the Board of Managers for unpaid common charges, is subject to the rights of a purchase money mortgagee of the unit. Cadlerock Joint Venture, L.P. v. Kahn was reported on page 24 of the New York Law Journal of September 6, 2000.

Contracts – Under a liquidated damages clause in a contract for the sale of a cooperative unit, the seller was entitled to retain the contract deposit of $115,000 (10% of the purchase price) in the event of the purchaser's default. After the purchaser's default, the seller retained the downpayment and resold the unit for a higher price. The Supreme Court, New York County, held that the deposit was not recoverable by the purchaser since the liquidated damages provision was reasonable when the contract was executed as required by UCC Section 2-718 which provides, in part, that "damages…may be liquidated…at an amount which is reasonable in the light of the *anticipated* or actual harm caused by the breach…". Fleck v. Daniel was reported on page 26 of the New York Law Journal of September 5, 2000.

Erie County Transfer Tax – Chapter 291 of the Laws of 2000, enacted and effective on August 23, 2000, amends Tax Law Section 1428-a to provide a credit for the Erie County Transfer Tax on the resale of residential premises which was vacant when purchased by the seller and is being resold improved by a residential premises.

Mechanics Liens – The Supreme Court, New York County, held that mechanics liens could not be filed under the Lien Law for the general oversight of a construction project. The performance of collateral supervisory functions, such as the negotiation of contracts or the procurement of bids or building permits, constitutes non-lienable work. Except as specifically provided in the Lien Law, lienors are those who have been engaged to perform direct, on-site labor. Matter of 110 Church LLC was reported on page 27 of the New York Law Journal of September 20, 2000.

Mechanics Liens – In an action brought by a mechanics lienor to recover payment for material delivered to an electrical contractor for installation at a property in Manhattan, the Supreme Court, New York County, dismissed the action as against the fee owner and a tenant for the failure to plead that the materials were provided at their request or with their consent, as required by Section 3 of the Lien Law. Midway Electric Supply Co., Inc. v. Kips Bay Development Limited Partnership was reported on page 22 of the New York Law Journal of August 30, 2000.

Mechanics Liens – The Supreme Court, New York County, held that a mechanics lien could not be filed by an unlicensed home improvement contractor for work done for a condominium unit owner within the City of New York. Administrative Code Section 20-387 requires that such contractors obtain licenses prior to doing home improvement work in a structure containing no more than four residences or dwelling units. Work for a unit owner with less than four units is, the Court stated, covered by the Section. Ellenhorn v. Campanella Construction Co., LLC, was reported on page 22 of the New York Law Journal of September 6, 2000.

Mortgage Foreclosure – The Supreme Court, Queens County discharged a mortgage in a bar claim action brought under RPAPL Section 1501 to the extent that it encumbered the interest of an owner/mortgagor tenant-in-common. The court indicated that the limitations period in which to foreclose against the plaintiff's interest (six years from default under CPLR Section 213(41)) was not tolled due to a bankruptcy petition having been filed by his co-tenant, who was also a mortgagor. Guichard v. Needham was reported on page 26 of the New York Law Journal on August 30, 2000.

Mortgage Loans - Part 41 of the General Regulations of the Banking Board, entitled "Restrictions and Limitations on High Cost Home Loans", effective October 1, 2000, was adopted to protect consumers by curbing abusive practices related to the advertising, brokering and making of High Cost Home Loans, defined to include loans up to $300,000 made to natural persons on the security of the borrower's personal residence meeting thresholds based on the interest rate or fees to be charged. Among the unfair and deceptive practices which Part 41 addresses are "flipping" (the frequent making of new loans to refinance existing ones), "packing" (the sale of additional products in a loan agreement without informed consent), and the making of loans without regard to a borrower's' ability to repay. No High Cost Home Loan can be made without disclosing to the borrower that he or she should consider credit counseling and without providing the borrower with a Banking Department list of approved counselors. No such loan is to be made unless the lender reasonably believes the borrower will be able to make the scheduled payments. For refinancings, the lender cannot required that the Borrower finance any portion of the points and fees

other than five percent of any additional proceeds received; for other loans, financed points and fees cannot exceed 5% of the total loan amount. Part 41 is at http://www.banking.state.ny.us/41ov.htm. Contact Vincent Plaia at 212-850-0651 for additional information.

Utilities – The Appellate Division, First Department, held that public utilities, here Consolidated Edison, are required for public construction projects, such as for sewer and roadway reconstruction, to protect or relocate at their expense their installations within permanent easements obtained from private owners. Section 24-521(b) of New York City's Administrative Code, which sets forth the requirement that utilities pay "interference costs", was found to override the common law rule that these costs must be borne by the City for utility facilities installed pursuant to easements. The common law rule holds a utility responsible for costs associated with protecting its facilities installed under City franchises during street repair projects. The City of New York v. Consolidated Edison Company of New York, Inc., was reported in the New York Law Journal on September 19, 2000.

1031 Exchanges - Internal Revenue Service Revenue Procedure 2000-37, issued September 15, 2000, approves "reverse exchanges" which enables replacement property to be acquired before the relinquished property is transferred. In order to qualify for the benefits of a Reverse Exchange, an Accommodation Titleholder ("AT") must actually hold legal title, and function in every way as the owner of the premises. The AT must be a taxable entity, or if it is a partnership 90% of the owning entity must be taxable. The taxpayer has 45 days after the AT takes title to the replacement property to identify the property to be relinquished. Within 180 days after the AT has taken title the swap must be completed. Within 5 days after the AT takes title, the taxpayer and AT must enter into a written agreement under which the AT agrees to hold the property for the taxpayer to facilitate a tax free exchange and the parties agree to adhere to Procedure 2000 in reporting all phases of the transaction. For additional information contact either Steve Waldman at 212-551-9450 or Diane Schaefer at 516-832-3200.

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