First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

A continuing series of bulletins issued by email to clients of First American

Carbon Monoxide Detectors – Section 378(5-a) of the Executive Law, added by Chapter 257 of the Laws of 2002, provides that every one or two-family dwelling, condominium or cooperative unit constructed or offered for sale after November 28, 2002 shall have installed an operable carbon monoxide detector. Section 1225.2 of Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York, setting forth standards for the installation and maintenance of carbon monoxide alarms, was adopted on an emergency basis by the State Fire Prevention Code Council effective March 6, 2003. The regulation is on the Internet at http://www.dos.state.ny.us/code/coalarm.htm. The Department of State's Codes Division confirms that the regulation does not apply in the City of New York.

Escrows – Proceeds of sale due the Estate of a tenant in common escrowed with a title abstract company were held subject to the claim of a nursing home. The Nassau County Department of Social Services ("DSS") filed a claim against the Estate for reimbursement of Medicaid Assistance. The DSS claim had priority over the claim of the nursing home. The Surrogate's Court, Nassau County, held that Escrow remained property of the Estate subject to the DSS claim, Estate of Isaac Snell was reported in the New York Law Journal on February 14, 2003.

Life Estates – A husband held a life estate in his wife's tenancy-in-common interest in their marital residence under her Will. He petitioned the Surrogate's Court, Nassau County, for an order authorizing the sale of the property to a third-party purchaser over objections of the Executrix (the daughter of the decedent from a prior marriage) and other remaindermen. The Court determined that the husband held a power of sale since the Will provided that he could neither be forced nor required to sell "until he so desires". RPAPL Section 1604, which provides that a petition by an owner of an interest in real property for an order directing a sale shall be granted if the "act to be authorized is expedient", is authority for an order enabling exercise of the power of sale. Matter of Sauer, decided November 18, 2002, is reported at 753 N.Y.S. 2d 318. Following the sale, in a decision issued March 13, 2003, the Surrogate' Court granted the life tenant's application that he be paid from the proceeds the value of his life estate in a gross sum. Matter of Sauer, 2003 N.Y. Misc. LEXIS 190.

Merger of Estates – The Appellate Division, Third Department, reversed an Order of the Supreme Court, Albany County, which had dismissed the complaint in an action to enforce an easement, and enjoined the owners of the burdened property from interfering with the reasonable use of the easement by the purchaser of the benefited property at a mortgage foreclosure. The interest of the mortgagee of the dominant estate and its successors was protected notwithstanding the properties had been in common ownership. Further, merger prior to execution of the mortgage had not terminated the easement since the defendants, who owned the benefited property, did not then hold all tenant-in-common interests in the burdened property. Cowan v. Carnevale, decided December 19, 2002, is reported at 752 N.Y.S. 2d 737.

Mortgages – The plaintiff's attorney requested a payoff statement from the existing mortgagee. The lender sent a statement with charges for a "Facsimile Fee", a "Quote Fee" and a "Satisfaction Fee", the latter being for preparation of the satisfaction of the mortgage. An action was commenced to recover those fees under RPL Section 274-a ("Certificate of principal amount unpaid on mortgages of real property") and GBL Section 349 ("Deceptive acts and practices unlawful"). The Appellate Division, Second Department, held that the Supreme Court, Nassau County, improperly denied the plaintiff's motion for summary judgment on the claims for the Facsimile Fee and the Quote Fee. Under RPL Section 274-a, a lender is prohibited from charging "for providing the mortgage related documents", even if the plaintiff voluntarily agrees to pay those fees. It also held that the Supreme Court improperly denied the lender's motion for summary judgment on the issue of the Satisfaction Fee. RPL Section 274-a does not prohibit such a fee and plaintiff agreed to pay that fee in his mortgage. Dougherty v. North Fork Bank, decided January 13, 2002, is reported at 753N.Y.S. 2d 130.

Mortgage Foreclosure – Plaintiffs claimed that they were necessary parties to a foreclosure since they had entered into a contract of sale with the mortgagee in possession. The contract provided that the sale to them was contingent on the mortgagee obtaining title in foreclosure. The Supreme Court, Richmond County, held that plaintiffs were not necessary parties to the foreclosure and denied the motion to enjoin the transfer of title to an innocent purchaser for value at the sale. The contract was executed after filing of the notice of pendency, and the purchaser should not be penalized because the plaintiffs were misled. Krueger v. Benigno was reported in the New York Law Journal on February 19, 2003.

Option to Purchase – The plaintiff-tenant held an option to purchase during the term of its lease for a specified price "on terms agreeable to both parties". The plaintiff advised the defendant-lessor of its intention to exercise the option and requested a contract of sale. The lessor sent the tenant a contract providing it would take back a purchase money mortgage, the terms of which were unacceptable to the tenant and the tenant brought an action for specific performance. The Supreme Court, Bronx County, dismissed the complaint, finding there had not been a meeting of the minds on essential terms. The Appellate Division, Second

Department, reversed. Since the purchaser price was agreed upon and the option contained no mortgage contingency, the terms of the purchase money mortgage proposed by the seller were not material. A trial was required to determine whether the Tenant would be able to obtain financing and whether the lessor's insistence on certain terms was intended to undermine an otherwise enforceable contract. The Court held there is a covenant of good faith and fair dealing implied in all contracts. F & S Pharmacy, Inc. v. Dandra Realty Corp., decided February 4, 2003, is reported at 754 N.Y.S. 2d 256.

Patriot Act –The USA Patriot Act (Public Law 107-56) effective January 1, 2002, amended the anti-laundering provisions of the Bank Secrecy Act (31 U.S.C. Sections 5311-5332) to require that "financial institutions" implement anti-money laundering programs. It also requires financial institutions to report suspicious financial transactions to the Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN"). "Financial institutions" is broadly defined in 31 U.S.C. Sections 5312(a)(2) and (c)(1) to encompass "persons engaged in real estate closings and settlements".

On April 29, 2002, FinCEN published an "Interim Final Rule" (67 Fed. Reg. 21110) which prescribed anti-money laundering program requirements for banks, savings associations, registered brokers and dealers in securities, futures commission merchants, and casinos. All other financial institutions, including "persons involved in real estate closings and settlements" were temporarily exempted from the requirement to establish an anti-money laundering program until not later than October 24, 2002. In the interim, the Treasury Department and FinCEN were to study "the money laundering risks posed by these other institutions in order to develop appropriate anti-money laundering program requirements"

On April 10, 2003, FinCEN published an "Advance notice of proposed rulemaking" on "Anti-Money Laundering Program Requirements for Persons Involved in Real Estate Closings and Settlements" (68 Fed. Reg. 17569). It solicits comments by June 9, 2003 to assist it in determining how to implement the anti-money laundering requirements with respect to persons involved in real estate closings and settlements, including comments as to whether there should be an exemption for any category of persons who are "real estate professionals and those who trade in real estate on a commercial basis".

According to the Notice, FinCEN "does not believe that application of...(the) requirements to attorneys in connection with activities relating to real estate closings or settlements raises issues of, or poses obligations inconsistent with, the attorney-client privilege". 68 Fed. Reg. 17569 is can be obtained on the Internet at http://www.titlelaw-newyork.com/Mans/FedReg.pdf

Prescriptive Easements – The owner of the Chatsworth apartment building in Manhattan claimed title to an immediately adjoining three foot wide strip of land and sought an injunction against construction of a building partially in that strip

of land. Agreements entered into in 1899 and 1902 with the railroad company then owning the adjoining land granted the Chatsworth permission to use a retaining wall located within that strip of land. The building now being constructed will surmount the retaining wall and be as close as three inches to windows in the westerly wall of the Chatsworth. The Supreme Court, New York County, granted the defendant's motion to dismiss. It held that the Agreements did not grant title to or an easement of light and air over the strip of land and title by adverse possession was not established. Further, under New York law, an easement of light and air cannot be obtained by adverse possession. The new building could be constructed so as to limit light, air, and ventilation for rooms in the Chatsworth even if their occupancy would then be in violation of a zoning requirement that a window of a habitable room have eight feet of unobstructed clearance. Chatsworth Realty 344 LLC v. Hudson Waterfront Company A, LLC, decided March 4, 2003, is reported at 2003 N.Y. Misc. LEXIS 166.

Recording Act – A mortgage on 1783 Fifth Street ("1783 Fifth") and other property in Brooklyn was released from and then "spread" back to 1783 Fifth. The Release and the Spreader Agreement were, however, recorded out of order and a title examiner erroneously concluded that the mortgage was released from and did not encumber 1783 Fifth. In a foreclosure action brought by the holder of that mortgage, the defendant-purchaser of one of the lots into which 1783 Fifth had been subdivided alleged that he was a bona fide purchaser for value. The Supreme Court, Kings County denied the mortgagee's motion for summary judgment against the defendant-purchaser and the Appellate Division, Second Department, reversed. The purchaser had constructive notice of the mortgage and is charged with notice of the facts that a proper inquiry would have disclosed. Fairmont Funding, Ltd. V. Stefansky, decided January 21, 2003, is reported at 754 N.Y.S. 2d 54.

Recording Act – A property owner brought an action contending that an option was void for failure to record the option agreement. The Supreme Court, New York County, held that since the plaintiff knew of the option before it purchased the property it was not protected by New York Recording Act's RPL Section 294(3). The plaintiff was enjoined from transferring ownership and from entering into new leases at the property, and the closing date under the option was stayed until plaintiff furnished the documentation necessary to effectuate the closing. 1319 Third Avenue Realty Corp. v. Chateuabriant Restaurant Development Company, L.L.C. was reported in the New York Law Journal on March 5, 2003.

Restrictive Covenants – An action was brought by a civic association and local residents to enjoin construction of an electric utility substation by Con Edison. The property in question is subject to a restriction imposed in 1846 prohibiting "any slaughterhouse, smith shop, forge, furnace, steam engine, brass foundry, nail or other iron factory or any manufactory of gun powder, glue, varnish, vitriol, ink or turpentine or for the tanning, dressing or preparing skins, hides or leather or any brewery, distillery or any other noxious or dangerous trade or business". According to the Supreme Court, New York County, the substation is not of the same general

class as the specifically prohibited uses, and restrictive covenants are to be strictly construed. Herald Square South Civic Association v. Consolidated Edison Co. was reported in the New York Law Journal on April 17, 2003. (The Court also held that as Con Edison is not an "agency" its actions are not subject to SEQRA review).

Statute of Limitations – The holder of an interest in mortgaged backed securities brought an action against the mortgagee for damages, alleging misrepresentations in the Pooling Agreement as to the property's occupancy rate and debt service. The United States District Court, Southern District of New York, dismissed the complaint as being time-barred by New York's six-year contract statute of limitations. The limitations period commenced when the representations in the Pooling Agreement were made. It was not tolled until the loss to the certificate holders was realized after completion of the mortgage foreclosure. Under the Agreement, a suit could have been brought if the Trustee under the Pooling Agreement did not commence an action after receiving a written notice of default from a certificate holder. Structured Mortgage Finance Trust v. Daiwa Finance Corp. was reported in the New York Law Journal on March 10, 2003.

Tax Sales – Current Developments issued on April 12, 2002 reported the Appellate Division, Second Department's decision in Kennedy v. Mossafa at 737 N.Y.S. 2d 373. That holding affirmed an Order of the Supreme Court, Orange County, which granted summary judgment in an action brought by a tax sale purchaser and dismissed the third-party complaint of the former property owner alleging lack of adequate notice of the tax sale proceeding. The Court held that the tax district was not required to investigate when notices sent to the owner at her address on the tax roll were returned as undeliverable. Payment of prior taxes by checks listing the taxpayer's new address was not equivalent to a request to change an address for all property-related matters. This decision was affirmed by the Court of Appeals on February 25, 2003. See http://www.courts.state.ny.us/ctapps/decisions/24opn03.pdf.

"The Stoler Report" – New York's only live weekly radio broadcast featuring real estate and business leaders, hosted by First American Vice-President Michael Stoler, is broadcast Wednesdays at 9PM on WSNR 620 AM, and *live on the Internet* at http://www.stolerreport.com/. Joining Michael Stoler on May 7 to discuss "Residential Housing in Lower Manhattan and Liberty Bond Financing" will be David Lowenfeld, Executive Vice-President of World Wide Holdings, Tony Goldman, Chairman and Founder of Goldman Properties, Andrew J. Singer, Chairman and CEO of The Singer Bassuk Organization, and Richard Brancato, Director of Finance for Rockrose Development Corp. On May 14 discussing "Real Estate Developments in Long Island" will be Mitchell Rechler, Co-President and Chief Administrative Officer of Reckson Associates Realty Company, David Reiner, President of Real Estate Strategies, Inc. and Principal of Split Rock Capital, Steven J. Lifton, CEO of Lifton Financial Group, L.L.C., and Jan Burman, Chairman and Founder of Burman Properties and Principal in Engel Burman Senior Housing. The program on May 21 will be on "Alternative and Unique Uses for Commercial Real

Estate". For further program information contact Michael Stoler at mstoler@firstam.com.

Title Insurance – Funds wired by a new mortgage lender to Island Mortgage, its partner under a Warehouse and Security Agreement, were misappropriated and a check issued by an entity related to Island Mortgage to pay-off the prior mortgage was returned dishonored. In an action to foreclose the unpaid prior mortgage, the new mortgagee served a third-party complaint against the title insurance agent and its underwriter. It asserted that the agent was negligent in not ensuring good funds were received to payoff the prior mortgage and made claim against the underwriter for loss sustained by reason of it not having a first lien. The Supreme Court, Richmond County, dismissed the action against the underwriter. The loss was the result of theft by the Insured's contracting partner and a title policy excludes from coverage "Defects, liens, encumbrances adverse claims or other matters... created, suffered, assumed or agreed to by the insured". The third-party complaint against the agent for negligence was continued. Countrywide Home Loans, Inc. v. Lafonte, decided February 13, 2003, is reported at 2003 N.Y. Misc. LEXIS 127.

Transfer Taxes/1031 Exchanges - On March 13, 2003 New York City's Department of Finance responded to a Request for Ruling regarding application of the Real Property Transfer Tax ("RPTT") to a reverse like-kind exchange ("Reverse Exchange") under IRS Rev. Proc. 2000-37. Under Title 19, Section 23-05(b)(7)(i) of the Rules of the City of New York, a conveyance between principal and agent is exempt from transfer tax if a written agreement is entered into at the time of the transaction establishing a principal/agent relationship and the agent functions and is held out as an agent for all dealings with respect to the property (the "Nominee Agreement").

The Letter Ruling indicates that the only time the RPTT applies to the replacement property in a Reverse Exchange is on the transfer from the Seller to the Accommodation Title Holder (the "AT"), when the property is "parked". Only one real transfer of the replacement property is taking place despite the multiple transfers of the replacement property, from the seller to the AT, from the AT to the qualified intermediary (the "QI"), and from the QI to the taxpayer ("TP"). As long as there is a Nominee Agreement in place at the time of the transfer from the seller to the AT which identifies it as agent of the TP, and as long as the AT functions and is held out as the agent of the TP for the duration of the transaction, only the transfer from the seller to the AT will be subject to the RPTT.

FLR-024795-021 is at http://www.ci.nyc.ny.us/html/dof/pdf/02pdf/024795r.pdf. Contact Steven Waldman (212-551-9450) or Paula Zimmerman (212-551-9438) of First American Exchange Corporation for further information.

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