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Date: **February 22, 2005**

To: **All Clients and Friends**

From: **NY Underwriting Dept.**

Re: **Current Developments**

TITLE INSURANCE BULLETIN –NEW YORK
CURRENT DEVELOPMENTS

Adjoining Lands – Plaintiff sought a preliminary injunction to enjoin construction on land adjoining her property, claiming that the failure to underpin her home during construction had caused leaks and cracks in the structure of her dwelling. According to an engineer's report submitted by the plaintiff, there was "severe and irreparable damage" to the structure of the plaintiff's building and the building "should be removed". The Supreme Court, Bronx County, denied the plaintiff's motion. Since the plaintiff's building was already destroyed the plaintiff would not suffer any additional damage and there was no proof submitted that here building could collapse. Rodriguez v. City of New York was reported in the New York Law Journal on December 1, 2004.

Contracts of Sale – A contract vendee, a New York limited liability company that filed its article of organization with the New York Department of State one month after execution of the contract, brought an action for specific performance. The Supreme Court, Kings County, granted the defendant's motion for summary judgment dismissing the complaint and vacated the lis pendens filed in connection with the action. The Appellate Division, Second Department, affirmed, holding that when the plaintiff executed the contract it was a "purported entity" without the capacity to "acquire rights by contract or otherwise". 442 Decatur Street, LLC v. Spheres Realty, Inc., decided January 18, 2005, is reported at 2005 N.Y. App. Div. LEXIS 394.

Easements – In 1987, with the permission of the plaintiff-owners of the adjoining property, the defendants' predecessor-in-title erected a fence blocking a driveway on the defendants' property leading to garages in the rear of their parcels. The driveway had been used in common for ingress and egress under a recorded easement granted by common owners in 1922. Plaintiffs sought an order declaring that the plaintiffs' property was benefited by the easement, directing the defendants to remove the fence blocking access to the driveway, and enjoining the defendants from blocking access to the garage. Defendant counterclaimed that the easement was extinguished by adverse possession. The Supreme Court, Queens County, upheld the validity of

the easement and directed the defendants to remove the fence. According to the Court, since the fence was erected with the consent of the plaintiffs, and no claim of right hostile to the plaintiffs was asserted until May 2002 when defendants refused to comply with the plaintiffs' request to remove the fence, there was no ten-year period of hostile use to establish a claim for adverse possession. Koudellou v. Sakalis was reported January 5, 2005 in the New York Law Journal.

Escrows/Certificates of Occupancy – Counsel for the purchaser's lender held loan proceeds in escrow to ensure that a final certificate of occupancy was issued after closing. The escrow was to be forfeited to the lender three months after the closing date if a final certificate of occupancy had not been issued. The lender could then apply the escrow to obtain the final certificate of occupancy. After issuance of the final certificate of occupancy six months after closing, Purchaser commenced a Small Claims action to recover the escrow. Justice Straniere of the Civil Court, Staten Island, dismissed the action as against the seller, directed that the escrow to be turned over to the lender, and released the stakeholder from any liability. The Court ruled that a lawsuit had to be brought directly against the lender to determine disposition of the escrowed funds. Further, in dicta, the Court stated that since "there is an escrow agreement that provides for a forfeiture of that deposit to the lender if the final certificate of occupancy is not produced, that lender is under an obligation to either procure the final certificate of occupancy or insure that the parties do". In addition, according to the Court, "(t)he failure of a lender to insure (sic) that a mortgagor borrowing money so as to purchase a residential property for human occupancy [obtains a final certificate of occupancy], … may lead the superintendent of banking to revoke the lender's license". Divita v. Decker & Decker Partnership was reported in the New York Law Journal on December 22, 2004.

Estates – The decedent's infant child was the residuary devisee of a tenancy-in-common interest in a condominium unit and resided in the unit with his mother, the decedent's wife, after his father's death. The mother was not devised an interest in the condominium unit. The Executrix sought possession and a monetary judgment for use and occupancy. The Surrogate Court, Nassau County, held that the infant and his mother were jointly and severally liable for the reasonable value of their use and occupancy, from the date on which the Executrix demanded payment for their use and occupancy until the date on which they vacated the premises. A tenant in common by reason of a residuary devise can be liable for use and occupancy, and the Court did not agree with the mother's claim that as guardian in socage of her infant son she was not in possession individually and therefore not liable for her use and occupancy. Estate of Joseph Seviroli was reported in the New York Law Journal on January 12, 2005.

Federal Forfeiture – John Serendensky and his wife, Maria Caporale, owners of real property in Bronx County as joint tenants, executed a mortgage, which was recorded after the federal government filed an indictment charging Mr. Serendensky with conspiracies to commit bank fraud and launder money. A notice of pendency was also filed before the mortgage was recorded. The indictment claimed that Mr. Serendensky's interest in the property was forfeited to the federal government under 21 U.S.C. Section 853, the federal criminal forfeiture stature. The mortgagee then foreclosed, a referee's deed to the property was delivered, and a petition was brought by a subsequent purchaser of the property to clear title. The United States District Court, Southern District of New York, held that the foreclosure sale was invalid since, under the federal criminal forfeiture statute no action can be brought concerning real property after an indictment is filed alleging the property is subject to forfeiture. Further, the District Court held, the petitioner did not have standing to intervene in the forfeiture proceeding. She was not a bona fide purchaser, "reasonably without cause to believe that the property was subject to forfeiture",

when she purchased the property. The Circuit Court vacated the judgment of the District Court and remanded for further proceedings in which petitioner could establish her interest in the property. The Circuit Court held that the criminal forfeiture statute allows for the foreclosure of partial interests in real property and therefore the foreclosure of the wife's interest in the premises was valid. According to the Court, there was no notice of any purported lien against the wife's interest and "that [the mortgagee] purported to foreclose on the entire Premises [as opposed to the wife's interest only] is of no moment". Pacheco v. Serendensky, decided December 29, 2004, is reported at 2004 U.S. App. LEXIS 27082 and in the New York Law Journal on February 2, 2005.

Life Estates – Decedent's will devised her residence to petitioner "to have and hold for his life". On his death, or if he "sooner waive(d) the life estate herein created", the residence was to be devised to the respondent in the proceeding "absolutely and forever". Petitioner sought an order authorizing the sale of the decedent's residence and the distribution of sales proceeds equivalent to the present value of his life estate to him to enable him to pay for his residence at an assisted care facility. The Surrogate Court, Nassau County, held that the petitioner had a life estate and not a mere right of occupancy, that the Will did not provide for forfeiture of the life estate if real estate taxes and carrying charges were not paid of the property was not maintained, and, there being no requirement under the Will that he be in occupancy, the petitioner's failure to occupy the premises did not indicate an intention to waive the life estate. In addition, as the sale was "expedient" under Real Property Actions and Proceedings Law Section 1602, the petitioner's application to sell the property was granted. Matter of Strohe was reported in the New York Law Journal on December 28, 2004.

Marketable Title - The Surrogate Court, Dutchess County, issued an Order directing the sale of a parcel of real property by the Executor of an Estate to a named purchaser prior to December 31, 2004. One of the litigants in the action in which the Order was issued, also seeking to purchase the property, filed a notice of appeal. Notwithstanding that a motion for a stay of the Order was denied by the Appellate Division, the title company would not insure over the appellant's claim. The purchaser therefore moved for an Order extending her time to purchase and the Court ordered that the sale date be extended until forty-five days after the determination of the appeal. Appellant was ordered to post a $50,000 bond as security for all losses, including attorney's fees, incurred due to the delay in closing as the result of an unsuccessful appeal. Estate of Helen P. Lovell was reported in the New York Law Journal on December 29, 2004.

Mortgage Foreclosures – An action to foreclose a mortgage was dismissed by the Supreme Court, Westchester County, which also denied the plaintiff's motion to amend the judgment to recite that the plaintiff was not precluded from commencing a separate action of the note. The Appellate Division, Second Department reversed, holding that although the plaintiff could not bring another action to foreclose the mortgage he could commence a separate action on the note. McSorley v. Spear, decided December 20, 2004, is reported at 2004 N.Y. App. Div. LEXIS 15578.

Mortgage Recording Tax – Chapter 745 of the Laws of 2004 extended to January 17, 2005 the effective date of the changes made by Part Q of Chapter 60 of the Laws of 2004, relating to application of the mortgage recording tax to spreader agreements and additional mortgages, and the refinancing of wraparound mortgages. According to TSB-M-04(12)R, issued by the Technical Services Division of the New York State Department of Taxation and Finance and dated December 29, 2004, mortgage tax paid under Part Q on the recording of such instruments

on and after November 18, 2004, the earlier effective date, and before January 17, the extended effective date, will be refunded on submission of a Form MT-15.1 (Mortgage Recording Tax Claim for Refund) "within two years of the date the erroneous payment of taxes was received by the recording officer". The Memorandum was posted December 31, 2004 on the Web at www.tax.state.ny.us/pubs_bulls/memos/mortgage_rec_memos.htm.

Mortgage Recording Tax/New York State Transfer Tax – The new telephone number for obtaining information from the Technical Services Division, Office of Tax Policy Analysis, New York State Department of Taxation and Finance is 888-698-2914.

RESPA – A class action was commenced in the United Stated District Court for the Southern District of New York alleging violations of RESPA and New Jersey state law. Defendant's motion to dismiss the complaint for improper venue was granted. Section 2614 of RESPA (12 USCA) requires that an action alleging violations of RESPA be brought in any "district in which the property involved is located, or where the violation is alleged to have occurred". The named plaintiff's property was in Tennessee and Colorado and the defendant lender serviced their loans from Ohio. Webb v. Chase Manhattan Mortgage Corp. was reported in the New York Law Journal on January 26, 2005.

Usury – The Appellate Division, First Department, held that the enforcement of a mortgage note, and the foreclosure of a purchase money mortgage securing that note, is subject to the defense of criminal usury. Babinsky v. Skidanov, decided November 18, 2004, is reported at 784 N.Y.S. 2d 540.

This bulletin is sent courtesy of CB Title Agency of New York, LLC and First American Title Insurance Company of New York