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Date: September 12, 2007
To: All Clients and Friends
From: Cliff Bernstein
Re: Current Developments

**TITLE INSURANCE BULLETIN – NEW YORK
CURRENT DEVELOPMENTS**

Adverse Possession - Plaintiffs sought to quiet title to property in Nassau County deed to them by an unrecorded quit claim deed in 1981. They have been in possession of the property since that time. The County of Nassau claimed superior title by reason of a tax deed in 1989. The County asserted that property acquired by tax deed is taken by the County in its governmental capacity, and a municipality cannot lose title to real property held in its governmental capacity. The Supreme Court, Nassau County, declared that the County's title was subject to a claim of adverse possession and the Court held that the Plaintiffs had established title by adverse possession. According to the Court, "[t]hat a municipality takes land for tax collection purposes does not defeat an adverse possession claim if the subsequent purpose is merely re-sale, which is proprietary in nature and not a true governmental use". *Ammirati v. Van Wicklen*, decided July 11, 2007, is reported at 839 N.Y.S. 2d 685.

Deeds/Warranty of Title - The warranty deed to the Plaintiffs failed to mention an easement that had been granted but not yet recorded over part of the premises being conveyed which was intended to benefit an adjoining property. In an action for breach of the warranty and covenants in the deed to the Plaintiffs, the Appellate Division, Third Department, affirming the Order of the Supreme Court, Otsego County, held that the Plaintiffs' "actual knowledge of the easement prior to taking title presents no defense to the alleged breach of their deed covenants". In addition, according to the Appellate Division, the Plaintiffs were entitled to recover the legal fees they incurred in the lawsuit they brought against the owners of the adjoining property, in which the easement was upheld, since they had a reasonable basis to presume that cause of action would be successful. *Webster v. Ragona*, decided May 24, 2007, is reported at 836 N.Y.S. 2d 381.

Home Equity Theft Prevention Act - Chapter 308 of the Laws of 2006, the "Home Equity Theft Prevention Act", in addition to amending Banking Law Section 595-a ("Regulation of mortgage brokers, mortgage bankers and exempt organizations") and adding Section 265-A ("Home Equity Theft Prevention") to the Real Property Law, added Section 1303 ("Foreclosures; required notices") to the Real Property Actions and Proceedings Law ("RPAPL"). Section 1303 requires the plaintiff in a mortgage foreclosure to deliver with the

summons and complaint a notice, on a separate page in bold, fourteen-point type printed on colored paper that is a color other than that of the paper on which the summons and complaint are printed, captioned (in bold twenty-point type) "Help for Homeowners in Foreclosure" containing text set forth in the Act. Chapter 154 of the Laws of 2007, effective July 3, 2007, limits this requirement to mortgage foreclosures involving residential real property consisting of owner-occupied one-to-four family dwellings.

Home Inspectors - The Claimant in a small claims action alleged that the Defendant's inspection of the home she was purchasing did not reveal a defective heating system, which the Claimant replaced after the closing for \$3,400. She was unable to sue the Seller under the Property Condition Disclosure Act, Real Property Law, Article 14, since the Seller is an Estate and a disclosure statement is not required on the "transfer by a fiduciary in the course of the administration of a decedent's estate...". Justice Straniere of the Civil Court, Richmond County, held that a provision in the home inspection contract limiting the inspector's liability for "errors, mistakes, omissions, ... [or] negligence" to the amount of the fee paid is enforceable and, since the inspector had committed deceptive practices under General Business Law Section 349 ("Deceptive acts and practices unlawful"), the Claimant was entitled to recover the \$395 paid for the inspection. The Court also determined that there is no private right of action under Real Property Law, Article 12-B ("Home Inspection Professional Licensing"), which is enforceable only by New York's Secretary of State. *Carney v. Coull Building Inspections, Inc.*, decided June 8, 2007, is reported at 2007 WL 2119740.

Judgments - Under Civil Practice Law and Rules ("CPLR") Section 5014 ("Action upon judgment"), an action may be commenced in the year prior to the expiration of ten years from the first docketing of a money judgment to renew the judgment for an additional ten years. If granted, the renewal judgment takes effect "upon the expiration of ten years from the first docketing of the original judgment". In a matter decided by the Supreme Court, New York County, a judgment creditor commenced an action on October 22, 2001 to renew his judgment docketed on October 23, 1991 against the owner of a condominium Unit. The Court granted the application for a renewal judgment in 2005, nunc pro tunc to October 23, 2001. However, in 2002 Petitioner made a loan to the Unit owner secured by a mortgage on the Unit, believing it to be a first lien on the Unit. The Court held that the renewal judgment was properly granted, and the Court denied the Petitioner's motion to have it either vacate the renewal of the judgment nunc pro tunc to October 23, 2001 or to find that its mortgage is senior to the lien of the judgment. *Greenpoint Mortgage Funding, Inc. v. Gletzer*, decided June 21, 2007, is reported at 16 Misc. 3d 1114(A) and 2007 WL 2119748.

Mamaroneck, Westchester County - 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. 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. The Village of Mamaroneck, which includes parts of the Towns of Rye and Mamaroneck, has added Article IV ("Removal of Illegal Sewer Connections and Elimination of Illegal Discharge of Liquids") to Chapter 282 ("Sewers") of the Code of the Village of Mamaroneck. This new law, effective on

July 20, 2007, requires the issuance of a Discharge Compliance Certificate by the Code Enforcement Officer of the Village of Mamaroneck, or his designee, on or before August 1, 2007 for each apartment building and each cooperative and condominium complex in the Village; the Certificate must be renewed every five years. A Discharge Compliance Certificate is also required on the transfer of title to any other type of real property (not including a cooperative or a condominium unit) after July 1, 2007. Section 282-13 of Article IV of the Village of Mamaroneck Code states that “[n]o building on real property shall be used or occupied, in whole or in part, unless a discharge compliance certificate is issued therefor”.

Marketable Title - The Terms of Sale for a tax lien foreclosure on property located in Kings County provided that the premises were to be sold subject to “covenants, restrictions and easements, if any, of record” and if the purchaser at the sale raised a written objection to title the purchaser could obtain title insurance at the expense of the Plaintiff-NYCTL 1997-1 Trust (the “Trust”). A title search conducted after the sale disclosed a right of reverter held by The City of New York. The City refused to waive its right of reverter and two title companies declined to insure over that interest. The successful bidder then moved for an Order directing the Trust to cure the title defect or, alternatively, vacating the sale and requiring the refund of the deposit paid at the sale. The successful bidder’s contract being with the Referee, the Supreme Court, Kings County, declined to order specific performance. Instead, the Court vacated the sale and directed the return of the deposit. The City’s right of reverter rendered title unmarketable and to require the bidder to take title subject to this title defect would render meaningless the provision requiring title insurance. NYCTL 1998-1 Trust v. Mayfield, decided July 20, 2007, is reported at 2007 WL 2189498.

Mechanics’ Liens/Civil Court - Judge Singh of the Civil Court, New York County, has held that the Civil Court has the jurisdiction to hear a motion to discharge a mechanic’s lien for not being timely filed because the motion was brought as part of an action in the Civil Court to foreclose the lien. Under Lien Law, Section 19(6) (“Discharge of lien for private improvement”), an application to discharge a mechanic’s lien is to be made in the Supreme Court, or to a County Judge of the county in which the notice of lien is filed. However, the Civil Court of New York City has jurisdiction of an action to foreclose a mechanic’s lien not exceeding \$25,000 which is filed against property in the County in which the action is brought. (N.Y. Const. Art. VI, Section 15; N.Y. City Civ. Ct. Act, Section 203(e)). According to the Court, since the Plaintiff-mechanic’s lienor “has submitted itself to the jurisdiction of the Civil Court...it would be illogical to require defendant to bring a separate proceeding in Supreme Court seeking to summarily discharge the mechanic’s lien”. Hamiltonair Company, Inc. v. Gould, decided August 3, 2007, is reported at 2007 WL 2216365.

Mortgage Foreclosures - Following entry of a judgment in a foreclosure brought in the Supreme Court, Kings County, the property owner and the mortgagee entered into a forbearance agreement. The homeowner failed to make payments under the agreement and the Plaintiff reserved the judgment with notice of entry. However, the Court was never advised about the forbearance agreement and the amount due was not recalculated to reflect payments made under the agreement. Judge Kramer granted the Defendant’s motion to vacate the judgment and directed that the case be marked “disposed”. The decision further stated that this foreclosure could be revived *nunc pro tunc* and, if it was revived, the matter would be referred to a Judicial

Hearing Officer to recalculate the amount of the judgment. The Court also held as follows:

“...every forbearance agreement must be filed with the Clerk of the Court and if a violation of the forbearance agreement occurs and the foreclosure proceeding is therefore resumed, where the mortgagor has made payments under the agreement, then plaintiff must petition the Court to appoint a referee to recalculate the amount due under the mortgage taking those payments in account”.

Deutsche Bank National Trust Company v. Williams, decided August 8, 2007, is reported at 2007 WL 2265520.

Mortgage Foreclosures - The Supreme Court, Suffolk County, granted the application of the successful bidder at a foreclosure sale to vacate the sale, to relieve it from its bid, and to return its deposit. The mortgage being foreclosed was a second mortgage, subject to a mortgage that was discharged of record by a forged Satisfaction prior to the granting of the judgment of foreclosure and sale. The Court Order annulling the Satisfaction was recorded after the foreclosure sale was held. The Terms of Sale recited only that the sale was subject to “...any prior liens, encumbrances and/or prior mortgages...” and the existence of the prior mortgage, of which counsel for the foreclosing mortgagee was aware, was not disclosed. The Court set the matter down for a hearing to determine counsel fees to be awarded the applicant and found that the Referee was entitled to his statutory compensation. Champion Mortgage v. Knight, decided July 27, 2007, is reported at 16 Misc. 3d 1118(A) and at 2007 WL 2228805.

Mortgage Recording Tax - The New York State Department of Taxation and Finance has issued an Advisory Opinion which takes the position that a mortgage being recorded by the Albany County Business Development Corporation, a local development corporation formed under Section 1411 (“Local development corporations”) of the State’s Not-For-Profit Corporation Law, is exempt from the payment of mortgage recording tax. Under Section 1411(f), “(t)he income and operations of corporations incorporated or reincorporated under this section shall be exempt from taxation”. TSB-A-07(3)R (Petition No. M070329A) dated June 26, 2007, is at http://www.tax.state.ny.us/pdf/advisory_opinions/mortgage/a07_3r.pdf

Mortgage Recording Tax/New York State Transfer Tax - The New York State Department of Taxation and Finance has announced that the interest rate to be charged for the period October 1, 2007—December 31, 2007 on late payments and assessments of mortgage recording tax and the State’s Real Estate Transfer Tax will be 10% per annum compounded daily. The interest rate to be paid on refunds of those taxes will be 7% per annum compounded daily. The interest rates are published at <http://www.tax.state.ny.us/press/2007/int0807.htm>.

New York City/Emergency Repair Liens - Plaintiff commenced an action under RPAPL Article 15 (“Action to compel the determination of a claim to real property”) for a declaratory judgment holding that emergency repair liens for costs incurred by the City of New York for work done at property purchased by the Plaintiff were unenforceable. Under Article 15, the cause of action would not be barred by a statute of limitations. The City brought a motion to dismiss, contending that Plaintiff was required to proceed by means of an Article 78 proceeding, subject to the four month statute of limitations of CPLR Section 217(1) (“Proceeding against body or officer...four months”), which would have barred the cause of action. The Supreme Court, Kings County, denied the City’s motion. According to the Court, “not only does the City fail to

demonstrate that controlling authority required Plaintiff to proceed by way of Article 78, but it fails to provide any reason why it should be required". *Brooklyn LLC v. The City of New York*, decided June 12, 2007, is reported at 2007 WL 1687162.

New York City/Real Property Income and Expense Statements - The Department of Finance's website, at <http://nyc.gov/html/dof/html/jump/rpie.shtml>, advises that "[t]he Real Property Income and Expense (RPIE) filing deadline has been extended to Friday, September 28, 2007. In addition, you are no longer required to mail the RPIE certification. Instead, you will be required to sign the RPIE electronically. You will be able to print a copy of the filed RPIE for your records. Finally, you are no longer required to submit a paper copy of your rent roll".

Property Condition Disclosure Act - On a Property Condition Disclosure Statement the Seller-Defendants answered "No" to certain questions and the Plaintiff-Buyer's home inspector did not report that the property had any material defect. However, after closing the Buyer allegedly discovered material defects in the property. The Plaintiff asserted causes of action in fraud and for breach of contract. The Appellate Division, Second Department, reversing in part the ruling of the Supreme Court, Westchester County, held that the cause of action for breach of contract should have been dismissed since the contract provided that the premises had been inspected and was being sold "as is". However, it held that the Supreme Court properly denied the motion to dismiss the cause of action alleging fraudulent concealment. According to the Court, "the alleged false representations in the Disclosure Statement support a cause of action alleging fraudulent misrepresentation in that such false representations may be proof of active concealment". *Simone v. Homecheck Real Estate Services, Inc.*, decided July 24, 2007, is reported at 2007 WL 2127261.

Real Estate Taxes/New York City - Chapter 482 of the Laws of 2007, amending Real Property Tax Law ("RPTL") Section 302 ("Taxable status date") and adding RPTL Section 494-a ("Exemption from taxation of property upon transfer of title in certain instances"), is effective August 1, 2007 as to real property in a city with a population of one million or more. Real property acquired in New York City by a corporation or association entitled to an exemption under RPTL Section 420-a ("Nonprofit organizations; mandatory class") or RPTL Section 420-b ("Nonprofit organizations; permissive class") is now entitled to the exemption from the date it took title to the property, notwithstanding that title was acquired after the date on which the taxable status of a property is determined for the following fiscal year. In New York City the taxable status date is January 5 for the following fiscal year beginning July 1.

Restrictive Covenants - The deed conveying real property in Port Chester, New York to the Plaintiff, and the deed to the Plaintiff's grantor, each provided that the premises would not be used as a bakery for a period of fifty years. The deeds recited that the restriction was a covenant running with the land and enforceable by the grantor and its devisees, heirs, successors and/or assigns as the owner of a certain other property in Port Chester being used as a bakery. Plaintiff sought an Order either extinguishing the restrictive covenant pursuant to RPAPL Section 1951 ("Extinguishment of non-substantial restrictions on the use of land"), on the grounds that it was of no actual or substantial benefit or nullifying the covenant under General Business Law Section 340 ("Contracts or agreements for monopoly or in restraint of trade illegal and void"), also known as the "Donnelly Act", on the grounds that the restriction was an invalid agreement in

restraint of competition. The Supreme Court, Westchester County, granted the Defendant's motion to dismiss. As to the claim that the restriction was of no actual or substantial benefit the Court held that the covenant benefited the Defendant by preventing competition from a particular location in Port Chester. As to the Donnelly Act claim, the Court held that a restriction limiting what business may be engaged in did not *ipso facto* violate public policy, and, in any event, no Donnelly Act claim was stated because there was no agreement between competitors to restrain trade. *Neri's Land Improvement LLC v. J.J. Cassone Baker Inc.*, decided June 21, 2007, was reported in the New York Law Journal on July 10, 2007.

Subsidized Housing - The Section 8 Housing and Multifamily Assistance program, established by the Housing and Community Development Act of 1974, is administered by, and funds for the program are provided by, the United States Department of Housing and Urban Development. It includes a voucher program and a project-based Section 8 program. Project-based Section 8 is a form of rental subsidy allocated to units of privately owned housing with low-income families paying reduced rent based on income. The approved voucher payment is paid directly by a public housing authority, such as the NYS Division of Housing and Community Renewal and the NYC Housing Authority, to the property owner. The property owner must agree to adhere to the guidelines and requirements of the housing program.

The Court of Appeals affirmed the holding of the Supreme Court, New York County, that landlords "are obligated to continue accepting...section 8 rent subsidies and are not permitted to opt out of the federal section 8 rent subsidy program". Further, according to the Court of Appeals, for units with Section 8 rent subsidies otherwise subject to the Rent Stabilization Code, landlords may not decline to offer lease renewals consistent with the HUD approved form of lease, which form makes acceptance of a Section 8 subsidy a term of each lease signed with a Section 8 tenant. The Rent Stabilization Code (9 NYCRR 2552.5(g)(1)) requires that a renewal lease "be on the same terms and conditions as the expired lease...". *Rosario v. Diagonal Realty, LLC*, decided July 2, 2007, is reported at 8 N.Y. 3d 755.

Transfer Taxes - Chapter 596 of the Laws of 2006, the "Hudson Valley Community Preservation Act of 2007", signed into law by Governor Spitzer on August 15 and effective on January 1, 2008, authorizes Towns and Cities within the Counties of Putnam or Westchester to establish Community Preservation Funds. To provide a source of revenue for such Funds, the Act adds Article 33-B ("Tax on Real Estate Transfers in Towns") to the Tax Law, authorizing each Town and City in those Counties to enact, subject to approval by referendum at a November general election, a Local Law imposing a transfer tax of up to two percent (2%) of consideration on the conveyance of real property in such Town or City or an interest therein when the consideration exceeds \$500. Among the exemptions to be applied is "[a]n exemption from the tax which is equal to the median sales price of residential real property within the applicable town or city, as determined by the Office of Real Property Services pursuant to Section 425 of the Real Property Tax Law...". Returns will be required to be filed, and any tax due paid, to record an instrument conveying real property or an interest therein within the Town or City adopting the transfer tax.

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