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Date: September 9, 2008
To: All Clients and Friends
From: Cliff Bernstein
Re: Adverse Possession

TITLE INSURANCE BULLETIN – NEW YORK ADVERSE POSSESSION

Governor Patterson has signed into law Chapter 269 of the Session Laws of 2008 which amends the adverse possession standards set forth in Real Property Actions and Proceedings' Law Sections 501, 511, 512, 521, 522, 531 and 541. Chapter 269 also adds new RPAPL section 543 which, for the first time, addresses de minimus non-structural boundary encroachments and minor maintenance. These revisions to the adverse possession law of New York State take effect immediately and apply to all claims filed on or after the statute's effective date, July 7, 2008. A copy of Chapter 269 of the Laws of 2008 is attached.

Revised Section RPAPL 501 now contains specific definitions for the terms "*adverse possessor*", "*acquisition of title*" and "*claim of right*".

An "*adverse possessor*" is defined as follows: "A person or entity is an 'adverse possessor' of real property when the person or entity occupies real property of another person or entity with or without knowledge of the other person's superior ownership rights, in a manner which would give the owner a cause of action for ejectment."

The term "*acquisition of title*" is defined as follows: "An adverse possessor gains title to the occupied real property upon the expiration of statute of limitations for an action to recover real property pursuant to subdivision (a) of Section 212 of the Civil Practice Law and Rules [i.e. 10 years], provided that the occupancy, as described in Sections 512 and 522 of this article, has been adverse under claim of right, open and notorious, continuous, exclusive and actual."

A "*claim of right*" is defined as follows: "A claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be. Notwithstanding any other provision of this article, claim of right shall not be required if the owner or owners of the real property throughout the statutory period cannot be ascertained in the records of the county clerk, or the register of the county, or the county where such real property is situated, and located by reasonable means." This definition of a "claim of right", therefore, now accommodates the orderly absorption of strips and gores (concerning which the record ownership can not be traced in the public records) into property located adjacent to the untitled strips and gores.

Adverse possession, under a "claim of right" whether, (1) based upon a written instrument, judgment or decree [RPAPL Sections 511, 512] or (2) not under a written instrument or court judgment or decree [RPAPL Sections 521, 522] now requires the acts of the adverse possessor to have been "sufficiently open to put a reasonably diligent owner on notice" of the adverse possession.

A major revision of the adverse possession law in New York State is the inclusion of new RPAPL Section 543 which declares as "*permissive and non-adverse*", de minimus, non-structural encroachments and/or property maintenance which extends over boundary lines.

New Section 543 ("*Adverse possession; how affected by acts across a boundary line*") provides:

1. "Notwithstanding any other provision of this article, the existence of de minimus non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse.
2. Notwithstanding any other provision of this article, the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse."

These statutory amendments collectively are an attempt to clarify the adverse possession laws of New York and have resulted from extensive discussions between members of the state legislature, members of New York State Land Title Association and members of the New York State Bar Association. It is expected that these revised statutes will rectify some of the uncertainties which existed under the prior adverse possession law of our state.

There have been many inquiries to our title underwriters regarding their position on the new Section 543, de minimus encroachments.

For example, Stewart Title has not changed its position on adverse possession. When preparing a survey reading, we need to raise what is shown on the survey, i.e.:

"Fence is 1.2 feet north of southerly line."

The information given is enough to put the policy holder on notice of a potential problem. Adverse possession can not be determined solely by a survey. The survey does not contain information on who appears to be using the area in question.

Please feel free to contact our NY underwriting team should you have any questions.

This bulletin is sent courtesy of CB Title Agency of NY, LLC and Stewart Title Insurance Company.