

Cases of Interest to Title Insurance Litigators
A Selection of Summaries from 2010-2011

By Dana Blunt, Christopher Smart, Stefanie Lincoln, Ilan Nieuchoicz, and Jin Liu

TABLE OF CONTENTS

- I. Selection of Title Insurance Cases from April 2010 – April 2011
 - A. Agency Liability
 - B. Class Action
 - C. Closing Protection Letter
 - D. Coverage
 - E. Escrow Agent Liability
 - F. Policy Interpretation
 - G. Rescission
 - H. Recoupment
 - I. Tort Liability
 - J. Other
- II. Selection of Florida State and Federal Cases from April 2010 – April 2011
 - A. Equitable Subrogation
 - B. Foreclosure
 - C. Lis Pendens
 - D. Service of Process
 - E. Other

*Prepared for the FLTA Claims Roundtable
April 13, 2011 by The Carlton Fields' Weekly Update
Team*

I. Title Insurance Cases

A. Agency Liability

Agency Liability: insurer not liable for acts of its title issuing agent pursuant to construction escrow agreement

Business Bank of Saint Louis v. Old Republic National Title Ins. Co., 322 S.W. 3d 548 (Mo. App. May 4, 2010) (affirming summary judgment). The Bank sued Hillsboro based on Hillsboro's performance of its duties under a construction escrow agreement and also sued ORNTIC on a theory that Hillsboro was acting as ORNTIC's agent in performing those duties. ORNTIC moved for summary judgment arguing that Hillsboro was only its issuing agent and not authorized to act as its agent for purposes of the escrow agreement and that Hillsboro did not have either the actual or apparent authority to do so on behalf of ORNTIC. The trial court granted ORNTIC's motion and on appeal the Missouri Appellate Court affirmed. The title issuing agency agreement limited the scope of Hillsboro's agency to act on behalf of ORNTIC and



2010-2011 Cases of Interest to Title Insurance Litigators

expressly excluded escrow duties. Although Hillsboro had issued a commitment for the transaction, the Missouri Appellate Court held that escrow duties in connection with issuance of title insurance are distinct from those duties under a construction escrow agreement. Even though the agency agreement allowed ORNTIC to audit Hillsboro's escrow account, this did not create an agency for escrow purposes.

Agency Liability: warehouse lender states a cause of action against insurer for its alleged agent's improper disbursement of escrow funds

Texas Capital Bank, N.A. v. First American Title Ins. Co., 2010 WL 1904463 (W.D. Ky. May 11, 2010). TCB brought suit against First American and its bank for their actions as escrow agents in a series of loans in which TCB acted as a warehouse lender for Prajna. Prajna originated the loans with TCB's funds in exchange for allowing TCB to participate in a majority of the mortgage loans. When TCB learned that Prajna had in fact been using straw buyers and that the loan proceeds had been disbursed directly to Prajna instead of the sellers, TCB sued for \$3.2 million in damages. The First American defendants moved to dismiss on the basis that its bank was acting on First American's instructions and did not have a relationship with or liability to TCB. The court agreed and granted the motion to dismiss as to the bank. First American also argued that it had no liability for \$1.3 of the alleged damages as it had not acted as an escrow agent for those funds. Instead, its former agent Venture had served as the escrow agent for those funds. The district court noted that TCB had asserted an agency relationship between First American and Venture and that the issue of whether Prajna's criminal acts broke the chain of causation was too fact intensive to be determined on a motion to dismiss, and thus denied First American's motion.

Agency Liability: title insurer is not liable for title agent's misappropriation of escrowed funds where

escrow services were outside the scope of agency agreement and there is no basis for apparent authority

Fidelity National Title Ins. Co. v. Mussman, 930 N.E.2d 1160 (Ind. Ct. App., July 14, 2010) (reversed). Fidelity National Title Ins. Co. ("Fidelity") filed this appeal seeking to overturn the trial court's grant of summary judgment in the amount of \$1 .6 million in favor of Rhys and Sally Mussman ("the Mussmans") for conversion of funds held in escrow by Fidelity's agent, Intercounty Title Company ("ITC"). The issue on appeal was whether ITC was acting as Fidelity's agent when it provided closing and escrow services for the Mussmans. ITC was Fidelity's agent for the purpose of issuing title insurance. Their relationship was governed by an agency agreement, which specifically limited ITC's agency for Fidelity to title insurance related services. On appeal, Fidelity contended that it could not be held liable for ITC's misappropriation of funds because the closing and escrow services ITC provided were outside the scope of its agency agreement with Fidelity. Moreover, Fidelity had no direct communications with the Mussmans upon which the Mussmans could argue that ITC had apparent authority to act on behalf of Fidelity with respect to the escrows. Because ITC lacked actual and apparent authority to act as escrow agent for Fidelity, the Mussmans' claims against Fidelity failed. ITC was not Fidelity's agent for closing and escrow services, and, therefore, the trial court erred when it held that the Mussmans were entitled to judgment as a matter of law.

Agency Liability: title insurer not liable for escrow deposits held by its issuing agent where deposits were not held in connection with a closing or issuance of title insurance

Winkler v. Lawyer's Title Ins. Corp., 41 So. 3d 414 (Fla. 3d DCA August 4, 2010) (affirming declaratory judgment). Purchasers deposited funds with Costal



2010-2011 Cases of Interest to Title Insurance Litigators

Title to reserve condominium units. Coastal Title was Lawyer's Title's issuing agent and Coastal Title's principal was affiliated with the developer of the condominium project. When the developer and Coastal refused to return the deposits, the purchaser claimed their escrow deposits from Lawyer's Title. Lawyer's Title filed a declaratory judgment action arguing that it was not liable because the deposits were not being held in connection with a real estate closing or the issuance of title insurance pursuant to Section 626.8473, Florida Statutes. On appeal, the 3d DCA affirmed and noted that there was no evidence that Coastal Title was to be the designated closing agent for the transactions and that the contracts allowed the purchaser to designate the agent of its choice. As a result, the escrow funds were not being held pursuant to Section 626.8473 and Lawyer's Title was not liable pursuant to Section 627.792.

Agency Liability: title company is not agent of insurer for purposes of closings where written agency is limited to issuing title assurances and facts do not support apparent agency

Bergin Financial Inc. v. First American Title Co., 397 Fed. Appx. 119 (6th Cir. August 19, 2010) (affirming summary judgment). Bergin sued First American and its title insurance issuing agent Lincoln Financial, among others, for civil conspiracy, fraud, negligent misrepresentation, and RICO violations arising out of a series of flip transactions that Lincoln Financial closed and for which it issued First American commitments and policies. First American's liability was premised on its agency relationship with Lincoln Financial, both implied and apparent, and First American moved for summary judgment. The trial court granted summary judgment based on a finding that Lincoln Financial's actions as a closing agent were outside the scope of the written agency agreement. Bergin appealed. The agency agreement expressly limited Lincoln Financial's agency to is-

suing commitments and policies, but it also gave First American the right to examine Lincoln Financial's escrow accounts. First American had also issued various bulletins to Lincoln Financial and its other agents giving information regarding flip transactions. The 6th Circuit held that Lincoln Financial was not acting as First American's agent in closing the transactions because implied agency cannot exist under Michigan law, contrary to a written agency agreement and because insufficient evidence had been produced to support a theory of apparent agency.

Agency Liability: insurer not liable for attorney agent's theft of insured's funds where the theft took place before attorney contacted insurer for commitment

New Jersey Lawyers' Fund For Client Protection v. Stewart Title Guaranty Co., 2010 WL 4791918 (N.J. August 2, 2010) (reversing appellate opinion finding insurer liable for attorney's theft of escrow funds). The Goodmans retained attorney Pizzi to assist them to sell their home, which he did. They allowed him to retain a portion of the proceeds from the sale in anticipation of their purchase of a new home. Pizzi converted the funds for his own use. Thereafter he contacted the title agent for Stewart and ordered a commitment in favor of the Goodmans and planned the closing on their new home. The commitment was delivered to Pizzi and contained an express disclosure that Pizzi was not Stewart's agent and that Stewart was not responsible for any misappropriation of the Goodmans' funds. The closing took place and the checks issued by Pizzi were dishonored. The Goodmans obtained other funds to close and the Lawyers' Fund paid them and took an assignment of their claims and sued Stewart. The trial court granted Stewart's motion for summary judgment based on the fact that the funds had been stolen before any relationship between Pizzi and Stewart arose. Relying on the *Sears* opinion, the appellate court remanded.



2010-2011 Cases of Interest to Title Insurance Litigators

Sears stands for the proposition that the insurer is required to deliver the notice of disclosure contained in the commitment directly to the proposed insureds as opposed to delivering it to their attorney agent. Stewart petitioned the New Jersey Supreme Court for certification and the Supreme Court reversed. Without opining on *Sears* directly, or the argument that the required disclosure language in the commitment had been approved by the Commissioner of Banking and Insurance for delivery directly to a proposed insured's attorney and thus superseded *Sears*, the New Jersey Supreme Court held that the funds were stolen before the relationship between Stewart and Pizzi arose and thus the Goodmans could not have relied on Pizzi as a representative of Stewart and, when Pizzi did contact Stewart, it was not in a position to prevent the theft as it had already occurred.

Agency Liability: where agency agreement limits scope of agency, insurer not liable for agent's settlement and escrow actions

In re Taneja v. Old Republic National Title Ins. Co., 2010 WL 4882826 (Bkrtcy. E.D. Va. November 24, 2010) (granting motions to dismiss). Financial Mortgage, Inc. filed for reorganization under chapter 11 of the bankruptcy code and the trustee sued five separate title insurance companies seeking to recover \$68 million in damages to FMI based on mortgage loans for which the defendants provided closing protection letters, commitments and policies. The trustee alleged that Taneja, FMI's principal, had instructed the settlement agents in connection with these transactions not to pay off prior loans and not to record the insured mortgages. The defendants moved to dismiss arguing that FMI could not recover for its own fraud and that they were not liable for the settlement agents' actions under the trustee's respondeat superior theory. The bankruptcy court held that Taneja's fraud was imputed to FMI based on the sole-actor exception to the adverse-interest exception

to the common law doctrine of *in pari delicto*. The Bankruptcy Court also considered the copies of the agency agreements submitted with the defendants' motion to dismiss and found that the settlement agents were not the insurers' agents for purposes of their settlement functions and thus the insurers were not liable under a respondeat superior theory.

Agency Liability: express grant of authority to agent may not be inferred from insurer's failure to expressly exclude closing services

Northeast Credit Union v. Chicago Title Ins. Co., 2010 WL 4851075 (D.N.H. November 23, 2010) (granting summary judgment). Chicago's issuing agent, Warranty Title, closed a refinance transaction for Northeast in which it was refinancing two of its own existing mortgages on certain property. The proceeds of its new mortgage loan were to be used to pay off the two prior mortgages. After getting the loan proceeds, Warranty Title sent two checks to Northeast and procured a release of the prior mortgages. The checks bounced, and Northeast sought to hold Chicago Title responsible for the misappropriated funds based on the agency relationship between Chicago Title and Warranty Title and pursuant to the title insurance policy issued at the closing. Chicago Title moved for summary judgment arguing that Warranty Title was not its agent for settlement purposes and that there is no coverage under the policy. The district court held that in the absence of an express authorization from Chicago Title to Warranty Title, Chicago Title could not be held liable as Warranty's principal. The district court also rejected Northeast's argument that it was entitled to reinstate its own prior mortgages and that those would give rise to coverage under the policy because such actions on Northeast's part would give rise to 3(a) exclusion from coverage.

Agency Liability: on motion to dismiss agency agreement unclear as to scope of insurer's control



2010-2011 Cases of Interest to Title Insurance Litigators

over agent's settlement duties

First American Title Ins. Co. v. Travelers Casualty and Surety Co. of America, 2010 WL 5395055 (E.D. Va. December 23, 2010) (denying motion to dismiss). After representing to a lender that the loan transaction had closed, First American's issuing agent failed to record a mortgage and stole \$500,000 in lender funds. First American settled with various parties and also brought a claim on the \$100,000 surety bond insuring the agent and issued by Travelers. Travelers denied the claim and First American sued. Travelers moved to dismiss on three grounds: (i) First American was precluded from recovering for the wrongful acts of its agent, (ii) First American's settlement with other parties precluded recovery against Travelers' bond, and (iii) First American was precluded from recovering on a bond issued pursuant to a consumer protection statute. First American argued that the agent was only its agent for title insurance issuing purposes, not for settlement purposes, thus not its agent for purposes of the claim on the bond. The district court found the agency agreement to be unclear about the scope of the agent's agency because of the express limitation of the agent's duty and the simultaneous control granted to First American over the agent's settlement activities. As a result, the district court noted discovery would be required and denied the motion to dismiss on this basis. The district court also held that discovery would be required as to whether the settlement agreement precluded recovery against the bond. Finally, noting a pending appeal to the Fourth Circuit on the same issue, the district court withheld ruling on whether First American could recover on a bond issued pursuant to a consumer protection statute.

Agency Liability: to state a claim for apparent authority, the plaintiff must plead a representation by the principal, justifiable reliance on the representation, and a change in position or injury resulting

from such reliance

Flagstone Development, LLC and Heath v. Joyner, 2011 WL 144917 (D. Mont. Jan. 18, 2011) (order granting summary judgment). Plaintiffs sued First American Title to recover damages resulting from the alleged tortious rendering of escrow services by American Title. In their complaint, plaintiffs contended that American Title acted as an agent of First American, but failed to allege a theory to support agency. First American filed a motion for summary judgment on the ground that plaintiffs could not establish a principal/ agent relationship between First American and American Title. Although plaintiffs recognized no written agency agreement existed between First American and American Title, plaintiffs argued that First American could be liable under a theory of apparent agency because First American's website listed American Title as an agent. To recover under a theory of apparent agency, a plaintiff must plead a "representation by the principal, justifiable reliance on the representation, and a change in position or injury resulting from such reliance." In the Second Amended Complaint, plaintiffs failed to plead a representation by First American and/or detrimental reliance on such a representation. Plaintiffs could not raise these allegations for the first time on summary judgment. Because plaintiffs failed to establish an agency relationship between First American and American Title, the court granted summary judgment in favor of First American.

Agency Liability: statute of limitations was not tolled as against title insurer under doctrine of adverse domination even if title insurer knew its agent was engaged in fraudulent activities

Independent Trust Corp. v. Stewart Title, 2011 WL 529390 (N.D. Illinois February 7, 2011) (granting motion to dismiss). Independent Trust Corporation ("InTrust") sued Stewart Title for damages relating to a fraud scheme perpetrated by its agent, Intercounty



2010-2011 Cases of Interest to Title Insurance Litigators

Title Insurance Company of Illinois (“Intercounty”). In the 1980s and 1990s, the owners of Intercounty perpetrated a Ponzi scheme using Intercounty escrow account to invest in junk bonds in an attempt to increase earnings. By 1989, Intercounty had lost over \$25.8 million. To avoid disclosing these losses, Intercounty used money from new transactions to pay off earlier escrowers. Intercounty was an agent of Stewart Title and, pursuant to its agency agreement, Stewart Title contractually agreed to insure escrow funds that Intercounty managed. Stewart Title also held a twenty percent ownership interest in Intercounty. The owners of Intercounty were indicted in federal court in 2003 and, in 2005, they were convicted of fraud. Thereafter, InTrust brought this action for damages, which Stewart Title sought to dismiss, in part, on the statute of limitations. Stewart Title argued that the five year statute of limitations had expired. InTrust contended that the statute of limitations was tolled by the doctrine of adverse domination and that its claim against Stewart Title was timely filed. The doctrine of adverse domination tolls the statute of limitations on claims by a corporate plaintiff so long as the corporation is controlled by wrongdoers. Stewart Title argued that the doctrine of adverse domination could not toll the statute of limitations with respect to claims against third parties that did not control the corporation. The sole Illinois court opinion that addressed the doctrine of adverse domination was *Lease Resolution Corporation v. Larney*, 308 Ill. App. 3d 80, 241 Ill.Dec. 304, 719 N.E.2d 165 (1 Dist.1999). In *Larney*, the court held that the doctrine “tolls the statute of limitations for claims by a corporation *against its officers and directors* while the corporation is controlled by *those* wrongdoing officers or directors.” *Id.* (emphasis added). Based on this definition, the court found that the doctrine could not toll claims against third parties and, therefore, dismissed the claims asserted against Stewart Title.

Agency Liability: where principal pays agent’s attorneys fees under agency agreement, agent may still recover prevailing party attorney’s fees under escrow agreement

Menasha Forest Products Corp. v. Curry County Title, Case No. S058450 (Or. March 25, 2011) (reversing order limiting award of attorneys fees). Curry County Title (CCT) entered into an escrow agreement with Menasha that entitled the prevailing party to attorney’s fees incurred. Menasha sued CCT and its principal Transnation for breach of contract, negligence and declaratory relief. CCT and Transnation prevailed and sought attorney’s fees and the trial court granted fees in the amount of \$31,449.85. Menasha appealed arguing that CCT had not incurred any fees because Transnation had paid its attorneys fees pursuant their agency agreement which limited CCT’s liability to \$2,500. The appellate court agreed and limited the fee award to \$2,500. The Oregon Supreme Court reversed and held that CCT was entitled to recover fees because, while the agency agreement governs the rights and liabilities as between CCT and Transnation, it has no effect on the escrow agreement or CCT’s ultimate responsibility for the legal fees for services performed by CCT’s attorney.

Agency Liability: terms of agreement preclude insurer’s vicarious liability for acts of its title agent as escrow agent

Rowe Const. Inc. v. Title Mark, Case No. A10-1250 (Minn. App. March 29, 2011) (affirming order granting summary judgment). Rowe became involved in a mortgage flipping scheme in which it purchased property from a company. In fact, the seller used proceeds from the Rowe’s mortgage loan to purchase the property and an artificially inflated appraisal to “sell” the property to Rowe at an inflated amount and to pay Rowe \$25,000. When the mortgage went into default, Rowe sued Title Mark the closing [agent?]



2010-2011 Cases of Interest to Title Insurance Litigators

alleging that Title Mark had breached its fiduciary duty to Rowe by failing to disclose what it knew about the prior closing and the inflated appraisal and for failing to obtain a closing protection letter and against [against what?]. Rowe also sued Stewart Title alleging that Stewart Title was vicariously liable for Title Mark's actions pursuant to the agency agreement in place between the two. The trial court granted the defendant's motion for summary judgment, and, on appeal, the Minnesota Court held Rowe had failed to prove that a de facto fiduciary relationship existed between it and Title Mark such that it would require the disclosure of the prior sale and inflated amount. It also held that there was no contract requiring Title Mark to provide Rowe with a closing protection letter or any showing that Title Mark's actions would have been covered thereunder. Lastly, the Minnesota Court also held that Rowe's claims against Stewart Title were moot, but, even if they had not been the terms of the agency agreement would have precluded vicarious liability for Title Mark's actions as an escrow agent.

Agency Liability: insurer not liable for its licensed title insurance agent's defalcation where the agent holds funds as escrow agent and does not act as closing or title issuing agent

Cohen v. Chicago Title Ins. Co., 53 So. 3d 331 (Fla. 3d DCA December 29, 2010) (affirming dismissal with prejudice). Cohen contracted to buy property and deposited almost \$120,000 in escrow with Flagler Title. First American Title Insurance Company was the designated title insurance agent that issued the commitment for the transaction. When Cohen demanded her deposit back, she learned the money was gone and she made a claim to Chicago Title, an underwriter for Flagler Title, but Chicago Title denied liability. Cohen then sued Chicago Title, and the rest of Flagler Title's underwriters, seeking a return of her deposit pursuant to section 627.792, which makes

an underwriter liable for the defalcation by a title agent [of??] funds held in trust pursuant to section 626.8473. Chicago Title moved to dismiss arguing that Cohen's funds were not "held in trust" because Flagler Title had acted exclusively as an escrow agent and not as a closing or title issuing agent, and, as a result, section 627.792 did not apply. The trial court granted dismissal with prejudice. Discussing its own opinion in *Winkler* and citing the Florida Supreme Court's opinion in *Hechtman*, the 3d DCA held that "where an otherwise-licensed title insurance agent receives escrow funds for a real estate transaction in its limited capacity as escrow agent, those deposits are not trust funds, as defined by section 626.8473 . . . [and] the title insurer may not be held liable by operation of section 627.792."

B. Class Action

Class Action: individuals whose claims are barred by the statute of limitations cannot be members of a class

Perez v. First American Title Ins. Co., 2010 WL 1507012 (D. Ariz. April 14, 2010) (class definition amended and class representatives disqualified). Perez filed this litigation against First American on counts of unjust enrichment and unfair discrimination alleging First American arbitrarily denied them a discount rate while offering it to other refinancing Arizona homeowners who had similar risks. The court certified this litigation as a class action. First American argued that the class definition established by the court was impermissibly overbroad because it contained no time limit and may include individuals with time-barred claims. The court agreed and redefined the class using the statute of limitations associated with each count to set the time limits. The statute of limitations was three years for unjust enrichment and one year for unfair discrimination. Under the new definition, the class representatives



2010-2011 Cases of Interest to Title Insurance Litigators

were no longer members of the classes asserting both unfair discrimination and unjust enrichment claims. Accordingly, the court determined that the representatives could no longer represent the class and allowed leave so that they may be substituted for other members.

Class Action: failure to exhaust state administrative remedies is grounds for dismissal against title insurer

Patricia Mitchell-Tracey v. United General Title Ins. Co., 2010 WL 1837723 (D. Md., May 5, 2010) (judgment on the pleadings and decertification of class granted). Plaintiffs brought this class action litigation against title insurers and their agents alleging they had been overcharged for title insurance. Plaintiffs claimed that they were entitled to a “reissue rate,” but instead were charged an “original issue rate.” Defendants filed a motion for judgment on the pleadings and to decertify the class because plaintiffs failed to exhaust all administrative remedies available to them by the Maryland Insurance Administration (“MIA”) before filing this action. In response, plaintiffs argued that the action should not be dismissed because plaintiffs had filed a complaint with the MIA. Instead, plaintiffs argued that the litigation should be stayed pending a decision from the MIA. The court disagreed with plaintiffs and determined that the litigation should be dismissed to allow the MIA to determine whether the Insurance Code had been violated and what, if any, remedy plaintiffs would be entitled. Accordingly, the plaintiffs’ complaint was dismissed and the class was decertified.

Class Action: class defined based on mortgages, rather than title insurance policies, is overly broad

Hickman v. First American Title Ins. Co., 2010 WL 3075157 (N.D. Ohio August 5, 2010) (denying motion for class certification). Plaintiffs brought this putative class action against First American on the theory that

they were denied the reduced reissue rate in these refinance transactions when there was sufficient evidence of a prior policy based on the prior recorded mortgage. On their motion for class certification, the Ohio District Court held that they failed to meet the commonality and typicality requirements under Rule 23(a). Not every mortgage, the district court held, is necessarily accompanied by a title insurance policy, and by defining the class based on mortgages instead of policies plaintiffs included potential class members not entitled to the reissue rate. The Ohio District Court also held that, under Rule 23(b)(3), the class would require a highly individualized analysis to determine which members were entitled to a refund and, as a result, common questions of law or fact do not predominate.

Class Action: lack of proof that class representatives had a prior policy sufficient to deny certification absent appropriate substitution

Campbell v. First American Title Ins. Co., 269 F.R.D. 68 (D. Maine August 4, 2010) (granting in part, denying in part, motion for class certification) Plaintiffs brought this putative class action on the theory that a prior recorded mortgage constituted evidence of a prior policy entitling them to a reissue rate and moved to certify the class. First American opposed arguing, among other things, that a prior mortgage does not equal a prior title insurance policy. The Maine District Court first reworded the class definition to avoid a fail-safe class issue. The district court found that there was a lack of evidence as to whether the Campbells had a title insurance policy issued with their prior mortgage and they thus might not even be members of the class. While this might have been sufficient to deny certification the plaintiffs offered a substitute class representative.

Class Action: certification granted where plaintiffs’ theory of Florida law places entire burden of de-



2010-2011 Cases of Interest to Title Insurance Litigators

termining applicability of reissue rate on insurers

Commonwealth Land Title Ins. Co. v. Higgins, 2011 WL 362415 (Fla. 1st DCA February 7, 2011) (affirming orders granting class certification) Plaintiff homeowners sued Commonwealth and First American, two Florida licensed title insurance underwriters, alleging they were not provided a reissue rate discount when they refinanced their home loans. Florida law provides that a reissue rate applies to mortgage policies issued on refinancing of property insured by an original owner's policy which insured the mortgagor's title. Plaintiffs moved for class certification based on a class definition of all persons or entities in Florida who, from July 1, 1999 to the date of the Order, paid a title insurance premium to the defendants in mortgage refinance transactions in excess of that allowed by Florida law. Plaintiffs argued that the title insurers had a non-delegable duty to price premiums in accordance with Florida law. The title insurers argued that the individual issues, such as whether the plaintiffs presented copies of their prior policies or were notified of the availability of the reissue rate, would work to defeat the predominance and superiority requirements of Rule 1.220(b)(3). The trial court certified the class and the title insurers appealed. On appeal, the 1st DCA found that plaintiffs' theory of Florida law would place the burden of determining the applicability of the reissue rate on the insurers and, as a result, if this was true class certification would be appropriate. The 1st DCA noted that if plaintiffs' theory of Florida law proved incorrect on summary judgment, it was unlikely that the class actions would be able to proceed and the trial court could subsequently modify or decertify the class. Thus, despite noting the inefficiency of proceeding with class notification at that point, the 1st DCA affirmed.

Class Action: equitable tolling may apply where defendant intentionally conceals information and plaintiff is misled but the burden is on the plaintiff

to show competent facts

Chapman v. Commonwealth Land Title Ins. Co., 2011 WL 721915 (N.D. Tex. February 28, 2011) (order granting partial summary judgment and denying certification). Chapman brought this putative class action against Commonwealth asserting claims of money had and received, unjust enrichment, violations of RESPA, and breach of implied contract alleging that Commonwealth had improperly charged him an unearned fee of \$260.50 for lender title insurance on a refinance transaction within five years of a prior mortgage loan transaction in which he had been required to purchase lender title insurance. Chapman claimed that he was entitled to a reissue rate as a result of the prior policy. Commonwealth moved for summary judgment arguing that RESPA's one year statute of limitations barred Chapman's claims. Chapman did not deny that his claim was not filed within one year of the closing, but instead argued that equitable tolling should apply to preclude summary judgment because an average consumer like Chapman is unsophisticated and would not know he was entitled to a reissue rate. Commonwealth argued that equitable tolling is not warranted merely because of the plaintiff's ignorance of the law. Noting that the 5th Circuit has not applied equitable tolling to RESPA claims, the district court found that equitable tolling applies only where (i) a suit between the same parties has been pending in the wrong forum, (ii) plaintiff is unaware of facts supporting his claim because defendant intentionally concealed them, and (iii) plaintiff is misled as to his rights. In this case, the district court held that Chapman had failed to meet his burden and failed to provide any competent summary judgment evidence that he had been misled or that Commonwealth had intentionally concealed information from him. The court also denied certification as moot and dismissed the state court claims without prejudice.



2010-2011 Cases of Interest to Title Insurance Litigators

Class Action: 5th Circuit affirms denial of class certification for failure to meet predominance requirement under Rule 23(b)(3)

Benavides v. Chicago Title Ins. Co., Case No. 10-10136 (5th Cir. March 23, 2011) (affirming district court's order denying class certification). Benavides appealed the district court's order denying class certification, arguing that *Mims* allows questions to be determined on a class-wide basis purely based on whether a plaintiff is a member of a class under the insurer's underwriting guidelines. The Fifth Circuit disagreed and held that, while *Mims* held that the class definition in that case was appropriate, it did not hold that there were any class-wide questions. Here, the district court held that the plaintiff had failed to meet the predominance requirement under Rule 23(b)(3) because each of the questions posed had to be answered specifically and individually as to each plaintiff.

Class Action: attorney agents seeking ruling that insurers must use attorneys as title agents granted class certification

Gale v. Chicago Title Ins. Co., Case No. 3:06-cv-1619 (D. Conn. March 23, 2011) (order granting class certification). Plaintiff attorney, agent for Connecticut Attorneys Title Insurance Co., sought declaration that insurers are obligated to use licensed attorneys or certain grandfathered individuals as title agents and sought class certification of all licensed attorneys for the class period and those grandfathered individuals. Defendants argued, *inter alia*, that the class could not be certified because damages cannot be apportioned on a class-wide basis. The district court held that plaintiff met the requirements of Rule 23 (b)(2) and that it is not necessary to deny class certification merely because damages may not be apportioned on a class-wide basis.

C. Closing Protection Letter

Closing Protection Letter: mortgagee whose sole principal engages in fraud may not recover on closing protection letters, commitments or policies

Wilson. v. Stewart Title Guaranty Co., 2010 WL 4884255 (W.D. Kentucky November 4, 2010 (denying summary judgment). The Wilsons sued Stewart Title Guaranty Co. ("STGC") for breach of a title insurance policy they purchased in connection with their purchase of a parcel of real property in Bardstown, Kentucky. After the Wilsons purchased the property, Helm, a neighbor, filed suit against other neighbors alleging he owned a portion of the Wilsons' property via adverse possession. The Wilsons joined in the action to protect their rights to the land and requested STGC defend them in the action. STGC denied the Wilsons' claim arguing the Wilsons were not entitled to coverage because the policy did not insure against loss or damage resulting from "[e]ncroachments, overlaps, boundary line disputes or other matters which would be disclosed by an accurate survey or inspection...." The Wilsons claimed their loss resulted from the neighbor's lis pendens recorded against their property before the policy was issued. The Wilsons argued the lis pendens was an encumbrance on title that entitled them to coverage. A pre-existing lis pendens normally triggers coverage under a title policy. The undisputed facts revealed no evidence that the Wilsons had any knowledge or reason to believe the neighbor would claim a portion of their property by adverse possession. Therefore, the court found that absent evidence the adverse possession claim would have been disclosed by a survey of the property or inspection, STGC was not entitled to summary judgment.

Closing Protection Letter: assignee of administratively dissolved originating lender named in title



2010-2011 Cases of Interest to Title Insurance Litigators

insurance commitment and CPL entitled to intervene in action originating lender's action against title insurer

GMAC Mortgage, LLC v. Flick Mortgage Investors, Inc., Case No. 3:09-cv-125-RJC-DSC (W.D.N.C. March 7, 2011) (order on motion to intervene). Flick originated a \$459,600 mortgage loan that was closed by Chicago Title's attorney agent. Flick sold the loan to GMAC. It then learned that the agent misappropriated the loan funds rendering the loan worthless. Flick made a claim on the title insurance commitment issued by the agent and the closing protection letter issued by Chicago Title. Chicago Title denied the claim because Flick had not yet repurchased the loan from GMAC and had not suffered any actual loss. Flick sued Chicago Title for breach of the commitment and the closing protection letter and for bad faith denial of its claim. Chicago Title moved to dismiss on the basis of no loss and the district court denied that motion. In the meantime, GMAC sued Flick for failure to repurchase the worthless loan and obtained a judgment. Flick was then administratively dissolved, and GMAC sought to intervene in Flick's action against Chicago Title arguing that it was a judgment creditor of Flick and also as the true party in interest as it had been assigned the deed of trust. Chicago Title opposed the intervention arguing that GMAC was not the addressee of the closing protection letter and thus did not have a sufficient interest to intervene. The district court conducted its analysis under Rule 24(a)(2) and found that GMAC's motion was timely, that GMAC had a significant interest in the outcome of Flick's action against Chicago Title to intervene, that denial of the motion would significantly impair GMAC's interest, and that GMAC's interest were not adequately protected by the present litigants.

D. Coverage

Coverage: where original easement is excepted from coverage, partial release of that easement does not give rise to duty to defend or indemnify

GC Finance LLC v. Old Republic Title Ins. Co., 2010 WL 1408823 (M.D. Tenn. March 31, 2010) (vacating prior decision). GC made a claim based upon a partial release of an easement encumbering its insured property. GC claimed ORTIC missed the partial release in its search and in the exclusions to the policy and that as a result ORTIC had a duty to defend GC against the claims of the dominant estate. ORTIC maintained that the easement was expressly excluded from coverage and that the partial release did not create any new rights that did not exist in the original easement and that the partial release was not an "encumbrance" covered under the policy because it actually had the effect of increasing the value of the property. The district court agreed and vacated its prior order holding that the partial release did not materially change the dominant estate's rights from those established under the original easement and, as a result, the partial release was not an encumbrance under the policy, and that GC incurred no greater loss or damage than under the original easement.

Coverage: special tax authorization deemed an encumbrance on title covered by title insurance policy

MBK Celamonte, LLC v. Lawyers Title Ins. Corp., 2010 WL 1697703 (Cal. App. 4 Dist. April 28, 2010) (affirmed) MBK sued to enforce a title insurance policy issued by Lawyers Title and recover damages resulting from a special tax encumbering the property. MBK purchased a title policy from Lawyers Title in connection with undeveloped land purchased with the intent to build townhomes for sale. At the time of purchase, MBK understood the subject property



2010-2011 Cases of Interest to Title Insurance Litigators

was exempt from a special tax passed by the county. However, after MBK developed the townhomes MBK became aware that the special tax applied to the property. Thereafter, MBK filed a claim on its title policy, which Lawyers Title denied. MBK brought this action to enforce the policy on the ground the special tax was an encumbrance covered by the policy. Although the special tax was passed and recorded prior to the issuance of the title policy, the tax did not affect the property until after the final subdivision map was recorded. Accordingly, Lawyers Title argued that the tax was not an encumbrance against the property as of the date the policy was issued. The trial court disagreed with Lawyers Title and found the tax to be an encumbrance covered by the policy. On appeal, Lawyers Title argued that the tax was not an encumbrance because it was not within the statutory definition. The appellate court disagreed with Lawyers Title and held that the term “encumbrance” included taxes, assessments and all liens on real property. Accordingly, the appellate court affirmed that the special tax was a covered claim under the policy.

Coverage: title insurance policy does not cover taxes liens issued after the effective date of the policy

Rhone v. First American Title Ins. Co., 928 N.E.2d 1185 (Ill. App., May 17, 2010) (summary judgment affirmed). The Rhones sued First American for a declaration that the title insurance policy issued to them by First American on August 31, 2006 covered unassessed property taxes for 2004 and 2005. First American had issued the title insurance policy to the Rhones in connection with their purchase of a townhome. The policy covered defects, liens and encumbrances on title to the townhome as of August 31, 2006. In 2008, the Rhone received notice that the 2004 and 2005 taxes had not been paid. The Rhones

argued that the 2004 and 2005 taxes were liens on their property that were covered by the policy. However, it was not until 2008 that the 2004 and 2005 taxes became liens on the property by operation of the Tax Code. Because the liens encumbered the property after the policy’s effective date, the court ruled that the 2004 and 2005 taxes were not covered by the title policy.

Coverage: summary judgment is improper where there exists a jury question as to whether there was a loss under the title insurance policy

Lawyers Title Ins. Corp. v. Griffin, 691 S.E.2d 633 (Ga. App., March 9, 2010) (summary judgment affirmed in part and reversed in part). Griffin sued Lawyers Title for breach of contract and bad faith refusal to pay a claim on a title insurance policy issued by Lawyers Title resulting from the loss of an easement. The trial court entered partial summary judgment in favor of Griffin as to Lawyers Title’s liability, but denied Griffin’s motion for summary judgment as to the bad faith claim. The trial court also denied Lawyers Title’s motion for summary judgment. After the parties filed their respective appeals, the trial court entered an amended order denying both summary judgments in their entirety. The case then went to trial and a jury entered a verdict in favor of Griffin in the amount of \$773,217.50. Lawyers Title appealed arguing that the trial court erred in modifying its original order on the summary judgment motions and proceeding to trial because Lawyers Title had already filed its appeal on the trial court’s original order and paid costs for the appeal. Lawyers Title also appealed the trial court’s original order and contended that the trial court acted improperly by erroneously charging the jury, excluding expert witnesses and allowing recovery of certain expert fees. Because Lawyers Title had filed its notice of appeal from the original order, the trial court was deprived of jurisdiction to amend its



2010-2011 Cases of Interest to Title Insurance Litigators

original order and proceed to trial. Accordingly, the appellate court reversed the trial court's amended order and judgment on the jury verdict. The court then considered the trial court's order with respect to Lawyer Title's liability under the Policy. Lawyers Title had filed an affidavit stating that the lost easement had no impact on the value of the property. This created a question of fact that precluded summary judgment. As a result, the appellate court reversed the trial court's order on Griffin's motion for summary judgment.

Coverage: title insurance policy does not cover claims resulting from acts that occur after the effective date of the policy

Fells v. Stewart Title Guaranty Co., 2010 WL 197693 (E.D. Arkansas April 23, 2010). The Mitchells owned two pieces of real property in Little Rock, Arkansas. Fells entered into a contract to purchase one of the properties from the Mitchells. However, at closing, the Mitchells unknowingly deeded both properties to Fells. Stewart Title insured title to the two properties in favor of Fells and issued Fells an owner's title insurance policy. Fells and the Mitchells became aware that both properties were transferred as part of the transaction approximately one year after the closing. A lawsuit ensued between Fells and the Mitchells over the second property. The Mitchells sued Fells seeking to reform the deed to reflect only the one property they had intended to transfer. Ultimately, a jury found the Mitchells could not prove their case and denied to reform the deed. Fells was held to be the true owner of both the properties. Fells brought this action against Stewart Title arguing that Stewart Title breached its duty under the title policy because it failed to defend her and indemnify her for prosecuting the case with the Mitchells. Fells also sued Stewart Title for indemnification with respect to rents collected by the Mitchells on the second property during the year before Fells became aware she owned the

property. Stewart Title filed a motion for summary judgment on Fells claims. Under Arkansas law, the scope and terms of a title insurance policy is determined by the court as a matter of law. Accordingly, the court reviewed the terms of the policy and determined that litigation between Fells and the Mitchells involved claims outside of the scope of coverage. Under the plain language of the title policy, Stewart Title was not obligated to prosecute the slander of title claim Fells commenced against the Mitchells. Moreover, the court determined that the claims between Fells and the Mitchells arose after the effective date of the policy. Therefore, Stewart Title could not have breached the policy by failing to represent Fells in her litigation with the Mitchells.

Coverage: insured's claim based on easement was not covered where it no longer owned the property and was not liable to new owner for easement under special warranty deed

Londen Land Co., LLC v. Title Resources Guaranty Co., 2010 WL 3034871 (D. Ariz. August 3, 2010) (granting summary judgment). Londen acquired property and obtained an owner's title insurance policy from TRG. Subsequently, Londen conveyed the property to Florence Ventures LLC by special warranty deed for valuable consideration. Sometime thereafter, Londen discovered an easement burdening the property that was not disclosed in the policy and filed a claim with TRG. TRG and Londen both obtained diminution appraisals, and after the parties did not agree, Londen filed suit. TRG argued that as Londen had transferred the property to Florence, it had no continuing liability to Londen. Londen argued that its claim was covered because it was still in effect the owner of the property because it owned Florence or, alternatively, because it still had liability to Florence under the special warranty deed. The Arizona District court disagreed, granting summary judgment to TRG as Florence and Londen



2010-2011 Cases of Interest to Title Insurance Litigators

were separate entities and Florence, not Londen, was the owner of the property, and, further Londen had no continuing liability to Florence under the special warranty deed because it had not created the easement.

Coverage: insurer is responsible to phrase exceptions and exclusions clearly in order to apprise the insured of their effect and title insurance policy exceptions will strictly construed in favor of insured

Cohn v. First American Title Ins. Co., 2010 WL 3342971 (Cal. App., August 26, 2010) (reversing judgment entered in favor of First American and remanding for further proceedings). Cohen and Goggio (collectively, "Owners") sued First American for breach of a title insurance policy. Owners held title insurance on real property located within a subdivision adjoining land owned by the Roman Catholic Archbishop of San Francisco ("Archbishop"). The Archbishop asserted easement rights in the Owners' property and Owners made a claim on their title insurance policy with First American. First American denied Owners' claim. First American argued the easement was excepted from coverage under the title insurance policy. After being denied coverage, Owners sued Archbishop to quiet title and Archbishop countersued. The trial court ultimately found Archbishop was entitled to an easement of necessity over Owners' land and entered judgment against Owners. Owners then commenced the underlying action against First American for breach of title insurance policy for First American's failure to indemnify and defend Owners in the Archbishop lawsuit. The title policy had an exception for specific easements of record. First American argued and the trial court agreed that the easement by necessity awarded to Archbishop was excepted from the title insurance policy because it concerned the same land as the easement of record. On appeal, the court made the distinction between the easement of record and the easement of necessity. Although both easements

concerned the same land, the policy only excepted from coverage the recorded easement. Because exceptions to a title insurance policy must be strictly construed in favor of the insured, the appellate court ruled that the easement by necessity was covered under the policy. The judgment in favor of First American was therefore reversed and the matter was remanded for further proceedings.

Coverage: generally, an insured may not receive attorneys' fees absent a finding that the insured breached a duty to defend

Chicago Title Ins. Co. v. Voss, 791 N.W.2d 404 (Wi. App., September 1, 2010) (award of attorneys' fees reverses). Chicago Title sued Voss, its insured, seeking a declaratory judgment concerning the diminished value of Voss's property that resulted from an unknown natural gas easement. The easement was a defect covered by the title insurance policy. Chicago Title claimed the total loss and damage that resulted from the easement was \$14,000. Voss claimed the value of the loss was \$33,210. After trial, the court awarded Voss \$62,500 in damages under the title policy. In addition, the court awarded Voss \$24,412.50 in attorneys' fees and \$8,382 in costs. Chicago Title brought an appeal seeking to overturn the attorneys' fee award. Generally, each party to a lawsuit is liable for their own attorneys' fees. However, attorneys' fees may be awarded to an insured, by statute, if the court were to find an insurer breached its duty to defend its insured. Here, Chicago Title did not breach its duty to defend Voss. Therefore, Voss was not entitled to an award of its attorneys' fees.

Coverage: action for indemnification not ripe until underlying litigation completed

Minnwest Bank, M.V. v. Chicago Title Ins. Co., 2010 WL 4791918 (D. Minn. September 3, 2010) (granting motion to dismiss). Minnwest made a claim on its



2010-2011 Cases of Interest to Title Insurance Litigators

loan title insurance policy demanding a defense of mechanics' lien claims and seeking indemnification. Chicago Title agreed to defend under a reservation of rights. Minnwest then brought a declaratory judgment and breach of a loan title insurance policy action against Chicago Title as to Chicago Title's duty to defend the mechanics' lien claims and to indemnify Minnwest. Chicago Title moved to dismiss arguing that Minnwest's claims were not ripe pursuant to section 8(b) of the policy as the underlying litigation was ongoing. The district court agreed and held the action not ripe for decision based on the pending litigation and the section 8(b) of the policy.

Coverage: insured may not avoid duty to cooperate by filing suit, but filing suit alone does not automatically relieve insurer of its duties and leaves issues of fact that preclude summary judgment

Emigrant Mortgage Corp. v. Washington Title Ins. Co., 913 N.Y.S.2d 251 (N.Y.A.D. November 30, 2010) (reversing order granting summary judgment). Emigrant's mortgage was insured by Washington Title. After learning that its mortgage had not timely been recorded and that two other mortgage liens had been recorded prior to its mortgage, Emigrant made a claim on Washington Title, seeking payment. Washington Title hired counsel for Emigrant and a complaint was drafted but never filed and Emigrant then filed a lawsuit against Washington Title. Washington Title moved for summary judgment arguing that it was relieved from liability due to the insured's lack of cooperation under the policy in failing to agree with retained counsel's proposed complaint. Emigrant moved from summary judgment due to entitlement to indemnification. The trial court granted Washington Title's motion and denied Emigrant's motion as moot. On appeal, the Supreme Court held that Washington Title was within its rights to retain counsel for Emigrant in order to establish its lien. Even if it were unsuccessful, such an action would

establish Emigrant's damages. However, it found that there was an issue of fact as to whether Emigrant had failed to cooperate. While an insured may not insulate itself from the duty to cooperate merely by filing an action, there remained a question of fact as whether Emigrant's filing the action without more relieved Washington Title of its obligations under the policy.

Coverage: typically, a pre-existing lis pendens triggers coverage under a title insurance policy

Wilson, v. Stewart Title Guaranty Co., 2010 WL 4884255 (W.D. Kentucky November 4, 2010 (denying summary judgment). The Wilsons sued Stewart Title Guaranty Co. ("STGC") for breach of a title insurance policy they purchased in connection with their purchase of a parcel of real property in Bardstown, Kentucky. After the Wilsons purchased the property, Helm, a neighbor, filed suit against other neighbors alleging he owned a portion of Wilson's property via adverse possession. The Wilsons joined in the action to protect their rights to the land and requested STGC defend them in the action. STGC denied the Wilsons' claim arguing the Wilsons were not entitled to coverage because the policy did not insure against loss or damage resulting from "[e]ncroachments, overlaps, boundary line disputes or other matters which would be disclosed by an accurate survey or inspection..." The Wilsons claimed their loss resulted from the neighbor's lis pendens recorded against their property before the policy was issued. The Wilsons argued the lis pendens was an encumbrance on title that entitled them to coverage. A pre-existing lis pendens normally triggers coverage under a title policy. The undisputed facts revealed no evidence that the Wilsons had any knowledge or reason to believe the neighbor would claim a portion of their property by adverse possession. Therefore, the court found that absent evidence the adverse possession claim would have been disclosed by a survey of the property



2010-2011 Cases of Interest to Title Insurance Litigators

or inspection, STGC was not entitled to summary judgment.

Coverage: lender's cancelation of its own satisfactions revives mortgages affecting priority of refinance mortgage under policy but also gives rise to exclusion from coverage for matters created, suffered, assumed or agreed to

Northeast Credit Union v. Chicago Title Ins. Co., 2010 WL 4851075 (D.N.H. November 23, 2010) (granting summary judgment). Chicago's issuing agent, Warranty Title, closed a refinance transaction for Northeast in which it was refinancing two of its own existing mortgages on certain property. The proceeds of its new mortgage loan were to be used to pay off the two prior mortgages. After getting the loan proceeds, Warranty Title sent two checks to Northeast and procured a release of the prior mortgages. The checks bounced, and Northeast sought to hold Chicago Title responsible for the misappropriated funds based on the agency relationship between Chicago Title and Warranty Title and pursuant to the title insurance policy issued at the closing. Chicago Title moved for summary judgment arguing that Warranty Title was not its agent for settlement purposes and that there is no coverage under the policy. The district court held that in the absence of an express authorization from Chicago Title to Warranty Title, Chicago Title could not be held liable as Warranty's principal. The district court also rejected Northeast's argument that it was entitled to reinstate its own prior mortgages and that those would give rise to coverage under the policy because such actions on Northeast's part would give rise to 3(a) exclusion from coverage.

Coverage: insured is barred from re-litigating issue of damages that resulted from a title defect where damages had been considered by the arbitration panel and the parties had a full and fair opportunity to litigate damages

Meisel v. Lawyers Title Ins. Corp., 2010 WL 5071294 (Minn. App. December 14, 2010) (reversing judgment). Meisel sued Lawyers Title for breach of a title insurance policy he purchased in connection with the purchase of real property. After closing on the purchase of the subject parcel of real property, Meisel applied for a building permit to improve the property. Meisel's permit application was denied because the development director believed the property contained Indian burial mounds. Shortly after the Minnesota State Archaeologists office verified there were burial mounds on the property, Meisel commenced an action for damages against the owner and the broker. Because of an arbitration clause in the purchase and sale contract, Meisel's claims were brought before an arbitration panel. The panel considered the evidence and found that the previous owner had knowledge of the burial mounds and failed to disclose it to Meisel. The panel determined the value of Meisel's claim was \$40,000. In its action against Lawyers Title, the trial court determined that Meisel had a valid claim under its title insurance policy and awarded Meisel damages in excess of \$40,000, based on expert testimony concerning valuation. On appeal, Lawyers Title argued that damages could not exceed the \$40,000 amount determined by the arbitration panel and the trial court's failure to limit damages to the arbitrator's award was legally improper. Based on the legal principals of res judicata and collateral estoppels, the appellate court agreed with Lawyers Title's position and reversed the trial court's judgment because the trial court was estopped from reconsidering the issue of damages were Meisel had an opportunity to litigate the issue.

Coverage: exception for terms of declaration of condominium does not preclude claim for failure of declaration to create the insured condominium units where underwriter misidentified property



2010-2011 Cases of Interest to Title Insurance Litigators

Regions Bank v. First American Title Ins. Co., 2010 WL 5262251 (M.D. Fla. December 17, 2010) (denying motion to dismiss). Regions sued First American as successor in interest AmSouth alleging that First American failed to discover a title defect in the formation of the insured condominium units and building. First American moved to dismiss arguing, among other things, that Region's claim was precluded by an exception to the title insurance policy which excepted from coverage the terms, provisions, restrictive covenants, conditions, reservations, rights, duties, and easements in the Declaration of Condominium. The district court held that, because Regions was alleging a failure of the declaration to create the units and buildings due to First American's identification of the wrong property, its loss did not arise from the operation of the declaration but rather from the misidentification of the property and was thus not excepted from coverage.

Coverage: insurer was not liable to insured under title policy where insured breached the title policy prior to suffering compensable loss resulting from an insured title defect

Republic First Bank v. First American Title Ins. Co., Civil No. 08-2333 (D. New Jersey December 20, 2010) (granting summary judgment in favor of First American). Republic sued First American for breach of a lender's title insurance policy seeking to recover damages for failure of its mortgage lien to attach to certain real property. Republic made a loan secured by a mortgage on two parcels of real property. Unbeknownst to Republic, one of the parcels described in the mortgage was not titled in the borrower. After discovering the title defect, Republic took actions to correct the defect by securing a mortgage from the true owner of the parcel. Shortly thereafter, the true owner filed bankruptcy and the bankruptcy trustee sought to void the mortgage under the bankruptcy code. Because of the chal-

lenges presented by the bankruptcy action, Republic demanded First American indemnify Republic under the title policy. Fidelity denied Republic's claim on the ground Republic violated the terms of the title insurance policy before it suffered damages resulting from an insured loss. Based on the facts presented, the court found that Republic breached the title policy when it took actions to correct the title defect before it suffered damages from the defect and without first allowing First American to deal with the title issue. Accordingly, the court entered summary judgment in favor of First American.

Coverage: issues of fact may preclude insurer's liability in negligence and for breach of policy for failure to disclose tidelands claim where insurer seeks to cure by obtaining a riparian grant in favor of insured

Crain v. Old Republic National Title Ins. Co., 2011 WL 92736 (N.J. Super. January 12, 2011) (unpublished opinion) (reversing final judgment). Singer owned property title to which was insured by Old Republic. Singer contracted to sell the property to Crain but Crain refused to close because of a tidelands claim held by the State of New Jersey. Singer sued Crain for breach of contract and Old Republic for failing to disclose the claim and to quiet title. Singer moved for declaratory judgment against Old Republic and Crain moved for summary judgment arguing he properly cancelled the contract. The trial court granted Crain's motion and held Old Republic liable to Singer as a result of its failure to disclose the tidelands claim. Old Republic appealed arguing that the trial court erred in finding it liable under principals of negligence and that it had breached the policy. The appellate court held that Old Republic's liability, as a title insurance company, is limited to the policy, not in tort for negligence, and found there was thus an issue of material fact as to whether Old Republic took on additional duties than those imposed by the title policy. The ap-



2010-2011 Cases of Interest to Title Insurance Litigators

pellate court also held that there were issues of fact as to whether Old Republic breached the policy or whether it was doing what it was required to do under the policy by bringing an action and seeking a riparian grant as to Singer.

Coverage: a restrictive covenant limiting the use of property is not an encumbrance on title that is covered under an owner's policy

Pavillion Park LLC v. First American Title Ins. Co., 2011 WL 43222 (W.D. Ky. January 6, 2011) (granting summary judgment). Pavillion purchased the subject property at a foreclosure sale with the intention of developing it and First American issued Pavillion an owner's policy. Pavillion then discovered a recorded agreed order between a prior order and the state Department of Natural Resources and restrictive covenant running with the land. The restrictive covenant required the owner of the land to conduct certain remediation at its own expense prior to developing the property. Pavillion made a claim and First American denied its claim. Pavillion then sued and both parties moved for summary judgment. The district court noted that the policy covers defects, liens and encumbrances on title to the property and that it contains an exclusion for governmental regulations. In a cogent and well written opinion, the district court held that the restrictive covenant did not constitute an "encumbrance on title" because, although it affected the use of the property, it did not affect title to the property or the ability to pass title.

Coverage: where lender ends coverage by conveying title, coverage may still exist for damages sustained during the coverage period

M&I Marshall and Isley Bank v. Wright, 2011 WL 181292 (D. Ariz. January 19, 2011) (order denying motions to dismiss). First American issued a policy and a closing protection letter to M&I Bank for a mortgage loan that was closed by First American's

agent Lawyer's Title. When the loan went into default, M&I Bank learned that the borrower alleged her signature had been forged. M&I Bank nevertheless noticed a trustee and bought the property. M&I Bank then made a claim on First American, which First American allegedly failed to respond to. M&I Bank then sold the property to a third party by special warranty deed and filed suit against Wright, Lawyer's Title, and First American. M&I Bank also brought a deficiency action against the borrower, which it subsequently dismissed. First American moved to dismiss pursuant to Section 2(b) of the Conditions and Stipulations of the Policy which provides that insurance continues after conveyance of title only if the insured retains some interest in or debt secured by a purchase money mortgage on the property or if the insured has liability by reason of the covenants of warranty. First American argued that coverage was terminated under the policy because M&I Bank did not retain an interest in the property, did not hold a purchase money mortgage, and had limited its liability by means of the special warranty deed. The district court denied First American's motion to dismiss holding that when the "coverage period ends pursuant to Section 2(b) of the Conditions and Stipulations, coverage may still exist for damages sustained during the coverage period, even if a claim is submitted after the coverage period." Here, the court held, the end of the coverage period would not affect M&I Bank's claim which had been submitted during the coverage period, which was prior to the conveyance of title by the special warranty deed.

Coverage: claim based on prior recorded liens is not excluded as created, suffered, assumed or agreed to by lender where lender's negligent underwriting did not give rise to prior liens

Fifth Third Mortgage Co. v. Chicago Title Ins. Co., 2010 WL 5287532 (S.D. Ohio December 17, 2010) (order granting plaintiff's motion for summary



2010-2011 Cases of Interest to Title Insurance Litigators

judgment). Fifth Third brought an action against Chicago Title for denying its claim for indemnification and refusing to defend an action involving prior recorded mortgage liens on property on which Fifth Third's title insurance policy showed it had a first position lien. Chicago Title denied Fifth Third's claim because Fifth Third failed to follow objectively reasonable underwriting standards. Chicago Title initially argued that it was not bound by the policy because its agent was acting beyond the scope of its authority in issuing it. The agent's principal had apparently owned the property in question and given some of the prior recorded mortgages that had not been paid off. Chicago Title argued that by misrepresenting the state of title and participating in a transaction in which its principal was interested, the agent was acting beyond the scope of its authority. The district court disagreed and that, as a matter of law, the scope and existence of the agency was so clear as to be undisputed and that as a result Chicago Title was bound by the policy. Chicago Title also argued that Fifth Third should bear the risk of its borrower and the agent's scheme because Fifth Third was negligent in making its loan, first requiring documentation of income and assets but making the loan without ultimately obtaining that documentation and that its claim was excluded from coverage as having been "created, suffered, assumed or agreed to by the insured." The district court disagreed and held that Fifth Third's claim was not excluded as there was no evidence that Fifth Third knew about the defects and that its underwriting guidelines were "irrelevant pursuant to the express terms of the Policy." Chicago Title also sought to rescind the policy because, it alleged, it was defrauded by Fifth Third's implicit representation that it followed reasonable underwriting standards. The district court disagreed and found that the policy did not even mention Fifth Third's underwriting and that it was not material to the risk of insuring title. The district court concluded by denying Chicago

Title's motion for continuance so that it could conduct discovery, holding that Chicago Title had acted in bad faith as a matter of law, and ordering it to defend Fifth Third in the underlying foreclosure.

Coverage: the creation of a perfected interest in title is not a condition of coverage under a title insurance policy

Fidelity National Title Ins. Co. v. Keyingham Investments, LLC, 702 S.E.2d 851 (Ga 2010), Case No. S09G1783 (Supreme Ct. GA Oct. 18, 2010, rehearing denied Nov. 23, 2010) (affirming Court of Appeals reversal of summary judgment). Lenders sued title insurer for breach after insurer refused to issue a title insurance policy and cover lenders' losses resulting from a forged deed. Fidelity argued that the forged deed was void *ab initio* and did not create an insurable interest in the real property and, therefore, refused to issue the title insurance policy. Fidelity contended that the commitment required the delivery of a valid deed as a pre-condition for issuance of a policy. The court found Fidelity's argument unpersuasive. Title insurance protects an insured from losses stemming from title defects not discoverable from a search of the public records, including forgery. Accordingly, the court held that absent a specific exception from the title commitment, Fidelity was required to issue the title insurance policy and provide coverage.

Coverage: where insured is no longer owner, dismissal with prejudice against insurer is not proper where alternative theory of owner's warranty liability not considered

Grill v. Tigor Title Ins., 2011 WL 320422 (Cal. App. 3 Dist. February 2, 2011) (reversing dismissal on demurrer). Baumeister Ltd. purchased property insured under a policy issued by Tigor. The policy insured against a lack of access and defined the insured as the party named in the policy and "those who



2010-2011 Cases of Interest to Title Insurance Litigators

succeed to the operation of law as distinguished from purchase.” Coverage also existed for the insured for so long as it “shall have liability by reason of covenants of warranty made by the insured.” Baumeister made a claim based on the denial of access by neighboring land owners and the US Forest Service. Baumeister made a claim and Ticor filed suit to secure access. Prior to resolution of that case, Grill, the owner of Baumeister, asked Ticor’s permission to transfer the property to his name and Ticor assured him that this transfer would not affect coverage under the policy or its efforts to secure access. In 2000, Ticor secured an easement from the neighbors and the USFS’s commitment to issue Grill a special use permit and notified Grill that it had secured access and was closing its matter. Grill then transferred the property to a trust, of which he was the trustee, and an LLC of which he was the sole member and manager. In 2008, the USFS terminated the special use permit before the access road was built. Grill made a claim and Ticor denied it. Grill then sued and Ticor moved to dismiss (demurrer) on the basis that Grill was not the owner of the property. Grill asserted theories of estoppel based on Ticor’s representations, but the trial court granted the demurrer without leave to amend ruling that the transfer to the trust had terminated his status as owner and that the case was barred by the statute of limitations. On appeal, the California Appellate court agreed with the assessment that Grill was not the owner but held that the trial court had not considered the other possible avenue of liability, Grill’s potential liability under warranties of title, a possibility even if it involved him suing himself in his different capacities.

Coverage: senior lien holder does not have standing to seek coverage under title insurance policy issued to a junior lien holder

Sole Construction, Inc. v. Chicago Title Ins. Co., 2011 WL 333952 (E.D. Michigan Jan. 31, 2011 (granting

Chicago Title’s motion to dismiss). Sole held a construction lien for labor and materials furnished to a construction project known as Victoria Park in Van Buren Township, Michigan (the “Project”). The Project was the subject of a title insurance policy issued by Chicago Title to Fifth Third Bank. Fifth Third Bank assigned its interest in the mortgages on the Project to SRB. Sole’s lien attached to the property prior to the assignment. In January 2009, Sole sued to foreclose its construction lien. The court entered summary judgment in favor of Sole on March 26, 2010 and ruled that Sole’s construction lien was senior to the mortgage interest of Fifth Third Bank and/or SRB and that Sole was entitled to foreclose its lien on the Project. In April 2010, Sole filed the instant litigation claiming that Chicago Title and/or SRB failed and/or refused to pay Sole’s claim. Sole alleged it was a third-party beneficiary under the title insurance policy issued to Fifth Third Bank and was entitled to payment of its lien by Chicago Title. Chicago Title filed a motion to dismiss Sole’s complaint on the ground Sole was not a named beneficiary of the title insurance policy and Sole was not within a class of intended third-party beneficiaries. The court reviewed the policy and found no indication Chicago Title intended to provide benefits to third parties. Accordingly, the action was dismissed as to Chicago Title.

Coverage: claim by parents that deed to son was ineffective because county rejected it for recording not excluded from coverage under policy

Countrywide Home Loans, Inc. v. Commonwealth Land Title Ins. Co., 2011 WL 666188 (W.D. Pa. February 14, 2011) (granting plaintiff’s motion for summary judgment). Countrywide made a loan to son secured by a mortgage insured by Commonwealth. When Countrywide went to foreclose its mortgage, the son’s parents intervened, seeking to invalidate the deed into the son and the mortgage. They



2010-2011 Cases of Interest to Title Insurance Litigators

ultimately dropped out of that action and filed a separate quiet title action. Specifically, they argued that because the deed was rejected for recording by the county, it did not serve to effectively convey title. Countrywide sought coverage under the policy and Commonwealth denied the claim, refusing to defend Countrywide against the parents' allegations. Countrywide sued Commonwealth seeking a declaration that Commonwealth owes a duty to defend and indemnify it. Commonwealth argued because the parents alleged that the county's rejection of the deed caused its failure, the claim was excluded under the policy powers exclusion. The parties moved for cross summary judgment. The Pennsylvania District Court disagreed and held that for the purposes of determining a duty to defend "it is not the actual details of the injury, but the nature of the claim" that determines the duty. The Pennsylvania District Court accordingly granted Countrywide's motion for summary judgment holding that Commonwealth owed a duty to defend and indemnify Countrywide in the quiet title action and denying Commonwealth's motion.

Coverage: measure of loss under loan policy is the difference in value of property with and without the encumbrance as of the date the lender acquires title in foreclosure sale

Regions Bank v. Chicago Title Ins. Co., 2011 WL 709853 (S.D. Fla. February 22, 2011) (memorandum opinion on trial). Regions sued Chicago Title for failing to honor its claim on a \$26,350,000 policy arising out a billboard lease covering the entire subject property in favor of Clear Channel and recorded prior to the Regions mortgage. The property has been scheduled for a townhouse development. The district court found that, although Chicago Title and its agent were aware of the lease, they issued the policy without an exclusion for it. Regions demanded \$600,000 from Chicago Title. Chicago Title acknowledged Regions' claim was covered by the policy but took issue as to

whether Regions had sustained any damages, and thus whether its claim was excluded under 3(c) of the policy. Both parties submitted expert witness testimony as to the value of the property subject to the lease as of the date Regions purchased the property at foreclosure. The district court found both experts qualified and that the appropriate methodology for determining damages was the difference in value of the property with and without the billboard lease. Regions' expert testified that the highest and best use of the property was for the residential townhouse project planned by the borrower and that difference in value with or without the lease was \$600,000. Chicago Title's expert argued that Regions' expert's report was flawed, that the highest and best use was not residential development, and that there was no loss as the lease actually brought revenue to the property. The district court found that Regions' expert was more credible and it defied "common sense to say that a lease does not diminish the market value of a property when the lease encumbers the entire property." The district court awarded \$600,000 plus prejudgment interest to Regions and held that it was entitled to reasonable attorneys fees and costs under Section 627.428.

Coverage: interlocutory appeal granted as to whether a 1992 policy and a form 9 endorsement that cover rights of first refusal also cover all encumbrances in declaration of restrictions containing right of first refusal

Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co., 2011 WL 1045124 (E.D. Pa. March 23, 2011) (granting motion for interlocutory appeal). The issue of whether an insurer may expressly except ALTA 9 Endorsement coverage for loss based on a "right of first refusal or the prior approval of a future purchaser or occupant," by identifying a declaration of restrictions in which the right is embedded in Schedule B of the policy, was previously answered



2010-2011 Cases of Interest to Title Insurance Litigators

in this case in 2009 by the Third Circuit. The Third Circuit held that an insurer must do more to expressly except coverage for rights of refusal from ALTA 9 Endorsement coverage than simply list the instrument in which the right is embedded in Schedule B of the policy. Thereafter, the district court granted summary judgment holding that the title insurance policy covered all of the encumbrances contained in a declaration of restrictions, including all use restrictions and prior sale approval restrictions. Commonwealth moved for reconsideration or, alternatively, interlocutory appeal arguing that the policy and endorsement only covered certain types of restrictions, and not the ones that caused plaintiff's damages. The district court denied Commonwealth's motion for reconsideration, but, finding that this issue involves a question of law about which there is a substantial difference of opinion, the appeal of which will materially advance the litigation, granted the motion for interlocutory appeal and certified the following question: "whether the American Land Title Association 9 Endorsement provides title insurance coverage for whole instruments listed in Schedule B or whether the scope of coverage is limited to particular types of encumbrances."

E. Escrow Agent Liability

Escrow Agent: escrow agent has no duty to disclose information unless required by the terms of the purchase and sale contract

Wildcat Inns v. First American Title Ins. Co., 786 N.W.2d 268 (Iowa App., May 12, 2010) (summary judgment affirmed in favor of First American). Wildcat brought this appeal seeking to overturn summary judgment entered in favor of First American on counts of negligence and breach of fiduciary duty. Wildcat commenced the underlying litigation after First American denied Wildcat's claim for real estate taxes

that were not paid at closing. Wildcat argued that the taxes created a lien on Wildcat's property and that First American had a duty to ensure taxes were paid at closing or otherwise specifically inform Wildcat that the taxes would not be paid. First American acted as closing agent and escrow agent for Wildcat's transaction. Generally, there is no duty to disclose information received by an escrow agent unless required by the terms of the underlying purchase and sale agreement. The trial court found that First American complied with its duties under the contract and adequately disclosed the tax information to Wildcat on the closing statement Wildcat signed at closing. On appeal, Wildcat argued that First American had a duty to specifically point out to Wildcat what taxes would and would not be paid. The appellate court disagreed, holding that an escrow agent owes no duty to advise parties of their legal rights and has no reason to protect the rights of one party over the other. Because the tax proration was disclosed in the closing statement signed by Wildcat, the appellate court held that First American complied with its duties and affirmed summary judgment in favor of First American.

Escrow Agent: fees charged by escrow agent at closing may be in violation of agent's contractual duties and consumer protection laws if no services were actually performed in exchange for fees charged and collected

Bushbeck v. Chicago Title Ins. Co., 2010 WL 2262340 (W.D. Wash. June 1, 2010) (granting in part and denying in part motion for summary judgment). Chicago Title was retained by plaintiffs to provide closing services in connection with a loan refinance involving real property. In Washington, a loan refinance requires reconveyance of the deed of trust associated with the prior mortgage(s). The first mortgage refinanced provided that the lender would complete the conveyance for a fee of \$30



2010-2011 Cases of Interest to Title Insurance Litigators

and a recording fee of \$32. The second mortgage being refinanced also specified that the lender would reconvey the deed of trust; however, no specific fee was set. In connection with the refinance, plaintiffs signed escrow instructions acknowledging that Chicago Title was acting solely as an escrow holder and could not provide legal advice to any party involved in the transaction. The escrow instructions clearly advised plaintiffs to seek legal counsel if they had any doubt concerning the refinance transaction. Plaintiffs did not retain counsel. Chicago Title charged plaintiffs a reconveyance fee of \$270 (a \$135 fee for each of the two loans being paid off in the refinance). Plaintiffs questioned this charge at the closing and were advised by Chicago Title that the reconveyance fee was charged to cover the cost for Chicago Title to perform and record the reconveyances if the lenders failed to complete them. Chicago Title also informed plaintiffs that any unused portion of the reconveyance fee would be refunded to them. With this understanding, plaintiffs agreed to close and paid the fee to Chicago Title. Chicago Title did not perform or record either reconveyance because both were taken care of by the lender. Plaintiffs never contacted Chicago Title regarding the reconveyance fee Chicago Title charged. Instead, on May 14, 2008, plaintiffs filed this putative class action lawsuit against Chicago Title for breach of escrow contract, breach of HUD, violations of RESPA, breach of fiduciary and agency duties, and violations of Washington's Consumer Protection Act. Chicago Title filed a motion for summary judgment as to all counts of plaintiffs' complaint. Upon consideration of Chicago Title's motion, the court ruled that 1) although plaintiffs could not identify any term of the escrow contract Chicago Title breached, Chicago Title may have breached its duty of good faith and fair dealing when it failed to refund the unused portion of the reconveyance fee to plaintiffs; 2) the HUD-1 was not a contract upon which plaintiffs could sue because it included no contractual terms or conditions;

3) Chicago Title performed no services in connection with the reconveyance fee charged and may have violated RESPA; 4) plaintiffs' breach of fiduciary duty claim was barred by the economic loss rule; and 5) although the reconveyance fee was disclosed to plaintiffs prior to closing, Chicago Title may have violated Washington's Consumer Protection Act by failing to timely refund the unused portion of the reconveyance fee. Based on these findings, Chicago Title's motion for summary judgment was granted in part and denied in part.

Escrow Agent: where escrow agent has actual knowledge of facts presenting substantial evidence of fraud, agent has duty to disclose under Arizona law even if escrow instructions do not require disclosure of fraud

Thornton v. Chicago Title Ins. Co., 2011 WL 540287 (Ariz. App. February 15, 2011) (unpublished opinion reversing order granting motion to dismiss). Chicago Title acted as closing, escrow and title issuing agent for two loan transactions from the Thorntons to Hartwick. Although the Thorntons thought they were getting a first mortgage loan on the first property and a second mortgage on the second property subject to a \$575,000 mortgage, after the loans closed they realized that their mortgage on the first property was behind a first mortgage and that their mortgage on the second property was behind a \$1,060,500 [WHAT? FIRST MORTGAGE?]. After Hartwick defaulted and the first lenders foreclosed, wiping out the Thorntons' mortgages, the Thorntons sued Chicago Title for breach of fiduciary duty, negligence, and aiding and abetting fraud. They alleged Chicago Title failed to disclose to them that Hartwick was insolvent, had a history of defaulting on loans, and that their loans were being made on over-encumbered properties. Chicago Title failed also to provide them with commitments which they alleged would have disclosed the prior mortgages on both properties. The trial court



dismissed all three counts with prejudice, and the Thorntons appealed the dismissal of the breach of fiduciary duty count. They argued that Chicago Title as the escrow agent for the transaction had a duty to disclose facts that presented substantial evidence of fraud to them. Chicago Title argued that there is no duty to disclose unless that duty is set forth in the terms of the escrow agreement. The Arizona court held that if the facts actually known to the escrow agent present substantial evidence of fraud, there is a duty to disclose and reversed the trial court's order.

F. Policy Interpretation

Policy Interpretation: insurer may discharge its obligations to appeal an adverse decision by paying full policy limits

Mortensen v. Stewart Title Guaranty Co., 2010 WL 1643997 (Supreme Court of Idaho, April 26, 2010) (summary judgment granted). Plaintiff sued Stewart Title for fraud, breach of contract and other claims after Stewart Title refused to appeal an adverse decision concerning access to plaintiff's property. Plaintiff's access was insured via a title insurance policy issued by Stewart Title. Stewart Title defended plaintiff in the underlying litigation against plaintiff's neighbor and lost. After the loss, Stewart Title advised plaintiff that it intended to appeal the trial court's decision. However, after losing a motion for rehearing, Stewart Title opted instead to pay plaintiff full title insurance policy limits. Plaintiff's action against Stewart Title seeks damages for Stewart Title's failure to defend plaintiff's appeal. To determine the responsibilities of an insured, the court turned to the plain text of the policy. Here, the title policy established that Stewart Title had a right to pay full policy limits instead of defending an appeal. Because the language of the policy is not ambiguous, the court determined that Stewart Title had met its obligations under the policy by having paid full policy limits.

Policy Interpretation: insurer may tender policy limit in fulfillment of obligation to its insured even if access to the property is never obtained

Mortensen v. Stewart Title Guaranty Co., 235 P.3d 387 (Idaho July 1, 2010) (affirming summary judgment). Mortensen purchased property that relied on an easement across neighboring property for access. Stewart insured title and access to the property. When Mortensen sought to sell the property for purposes of subdividing and developing it, the neighbors refused to allow a widening of the access road. Mortensen took it upon himself to widen the road and the neighbor sued him. Mortensen made a claim and Stewart tendered a defense. At trial Stewart allegedly made representations that it would defend Mortensen through any appeal. When Mortensen's motion to reconsider was denied, however, Stewart elected to pay policy limits. Mortensen then sued Stewart for fraud, breach of contract, and emotional distress. The district court granted Stewart's motion for summary judgment. On appeal, the Idaho Supreme Court held that Stewart properly exercised its right to pay policy limits rather than continuing to defend Mortensen in the appeal. By tendering policy limits, Stewart fulfilled its duties as insurer, even if Mortensen never secured access to the property. The Idaho Supreme Court also found that Mortensen had not properly pled a quasi-estoppel claim against Stewart.

Policy Interpretation: insurer may tender title to the property to the insured lender in lieu of damages and in satisfaction of its obligations under a policy

JP Morgan Chase Bank v. First American Title Ins. Co., 724 F. Supp. 2d 619 (E.D. Mich. July 8, 2010) (granting motion for judgment on the pleadings). First American's agent defrauded JP Morgan's predecessor. The agent issued an ALTA 2006 loan policy insuring the lien of the mortgage but failed to create



2010-2011 Cases of Interest to Title Insurance Litigators

and obtain an effective mortgage lien for the lender. JP Morgan sued and First American obtained title to the property and tendered it in satisfaction of JP Morgan's claim. JP Morgan objected to title to the property, instead demanding money damages. Citing to a 7th Circuit opinion, JP Morgan argued that the policy simply does not allow the insurer to tender title as means of meeting its obligations. The Michigan District Court disagreed with JP Morgan and the 7th Circuit, noting that the 7th Circuit had ignored the nature of title insurance which does not insure the value of property and is not a guaranty of title. Instead, title insurance is a contract to indemnify for losses arising out of later discovered defects in title. Although the policy did not expressly provide tendering title as one means of satisfying the insurer's obligations, the policy did provide that First American could "establish title, or removed the alleged defect." Under these circumstances, the Michigan District Court held that, by tendering title to the property to JP Morgan, First American "established title" and fully performed its obligations under the policy.

G. Rescission

Rescission: insurer may rescind policy where insured who does not rely on policy in acquiring title fails to disclose a known recorded defect

Nourachi v. First American Title Ins. Co., 44 So. 3d 602 (Fla. 5th DCA August 6, 2010) (affirming final judgment rescinding title insurance policy). Nourachi purchased property at a tax deed sale and filed a quiet title action, obtaining a judgment by default. Shortly thereafter he learned that a portion of the property was in fact part of the Ocala National Forest and that the US Forest Service claimed the same. Nourachi then spoke with property appraiser's office which admitted that it had made a mistake by adding the property to the tax rolls since it belonged to the US government. Nourachi also contacted a surveyor

who generally confirmed what the US Forest Service and the County had advised him. Nourachi then sought and obtained an owner's title insurance policy in the amount of \$550,000 from First American and subsequently increased the amount of insurance to \$1.3 million. First American failed to pick up the US Government's interest in the insured property and Nourachi failed to disclose it. When he filed a claim, First American sued seeking to rescind the policy. The trial court granted final judgment in favor of First American. On appeal, the 5th DCA gave a well reasoned opinion summarizing the purpose of title insurance and surveying the case law in this area of the law and held that "where an insured does not apply for or receive a title insurance policy (or otherwise request a title search) from an insurer until after he has acquired title to the property, the insured's failure to disclose a material defect in title of which the insured had actual knowledge will preclude coverage." Judge Torpy wrote a strenuous dissent relying, *inter alia*, on the terms of the policy and expressing a concern that the majority's opinion creates ambiguity as to the insured's duty.

Rescission: insured's material omission in application will render endorsement void

1200 Ashland LLC v. Lawyers Title Ins., 2010 WL 5481800 (N.D. Ill. December 31, 2010) (final order denying declaratory judgment). Ashland purchased property in 2004. At the closing Ashland's lender requested a zoning endorsement to the policy, which Lawyer's Title's agent issued in connection with the lender's policy. Although Ashland later contended it had asked for a similar endorsement to the owner's policy, there was no evidence of such a request. In 2006, Ashland learned that a portion of the property was zoned differently than as set forth in the lender's policy zoning endorsement. Ashland contacted the agent and had a zoning endorsement issued. The agent complied and issued a zoning endorsement



2010-2011 Cases of Interest to Title Insurance Litigators

based on the one issued to the lender. Ashland then made a claim and when Lawyer's Title denied the claim, Ashland sued for declaratory judgment. The district court held there was no evidence of a 2004 request for a zoning endorsement. The district court also held that under the Illinois insurance code a misrepresentation in an application for insurance that materially affects acceptance of the risk assumed by the company will allow the company to avoid the policy. Materiality is based on whether a reasonably careful and intelligent person would regard the omission as "as substantially increasing the chances of the event insured against, so as to cause a rejection of the application." In this case, the district court held that Ashland failed to disclose that it knew that a portion of the property was zoned differently than as set forth in the endorsement and that omission rendered the endorsement void.

Rescission: insurer not entitled to rescind policy based on lender's allegedly poor underwriting where poor underwriting does not impact an express provision of the policy

Fifth Third Mortgage Co. v. Chicago Title Ins. Co., 2010 WL 5287532 (S.D. Ohio December 17, 2010) (order granting plaintiff's motion for summary judgment). Fifth Third brought an action against Chicago Title for denying its claim for indemnification and refusing to defend an action involving prior recorded mortgage liens on property on which Fifth Third's title insurance policy showed it had a first position lien. Chicago Title denied Fifth Third's claim because Fifth Third failed to follow objectively reasonable underwriting standards. Chicago Title initially argued that it was not bound by the policy because its agent was acting beyond the scope of its authority in issuing it. The agent's principal had apparently owned the property in question and given some of the prior recorded mortgages that had not been paid off, and Chicago Title argued that by misrepresenting the

state of title and participating in a transaction in which its principal was interested the agent was acting beyond the scope of its authority. The district court disagreed and that, as a matter of law, the scope and existence of the agency was so clear as to be undisputed and that as a result Chicago Title was bound by the policy. Chicago Title also argued that Fifth Third should bear the risk of its borrower and the agent's scheme because Fifth Third was negligent in making its loan, first requiring documentation of income and assets but making the loan without ultimately obtaining that documentation and that its claim was excluded from coverage as having been "created, suffered, assumed or agreed to by the insured." The district court disagreed and held that Fifth Third's claim was not excluded as there was no evidence that Fifth Third knew about the defects and that its underwriting guidelines were "irrelevant pursuant to the express terms of the Policy." Chicago Title also sought to rescind the policy because, it alleged, it was defrauded by Fifth Third's implicit representation that it followed reasonable underwriting standards. The district court disagreed and found that the policy did not even mention Fifth Third's underwriting and that it was not material to the risk of insuring title. The district court concluded by denying Chicago Title's motion for continuance so that it could conduct discovery, holding that Chicago Title had acted in bad faith as a matter of law, and ordering it to defend Fifth Third in the underlying foreclosure.

H. **Recoupment**

Recoupment: title insurer entitled to recover premiums due and owing to it held in escrow account levied upon by the IRS

Old Republic National Title Ins. Co. v. U.S., 2010 WL 1727382 (S.D. Fla. April 28, 2010) (granted in part and denied in part). Old Republic brought this action to recover title insurance premiums levied



2010-2011 Cases of Interest to Title Insurance Litigators

by the IRS. Citizens Title Services, a title agent of Old Republic, owed a substantial sum of money to the IRS for unpaid employment and unemployment taxes. Accordingly, the IRS levied Citizens' accounts, including certain escrow accounts. These accounts contained title insurance premiums due and owed Old Republic. Old Republic made demand on the IRS to return the escrowed funds on the ground that escrow accounts are typically except [should this be EXEMPT? Or Excepted?] from levy. However, the IRS refused Old Republic's demand and insisted that the escrow accounts were actually regular checking accounts. Old Republic brought this action seeking the return of the premiums it claims were due and owed to it by its agent. At trial, Old Republic was able to prove that a majority of the funds in the accounts were premiums that belonged to Old Republic. Accordingly, the court ruled that Old Republic was entitled to recover those funds from the IRS. However, the court also ruled that the IRS was entitled to keep any funds that Old Republic could not prove with certainty belonged to Old Republic or another third party.

Recoupment: Lender was entitled to husband's proceeds from sale of marital residence held as joint tenants notwithstanding fraudulent conveyance of wife's interest.

Land America Commonwealth Title Ins. Co. v. Kolozetski, 992 A.2d 681 (Sup. Ct. New Hampshire, Jan. 29, 2010) (affirmed). Dorothy Kolozetski appealed the trial court's order awarding the proceeds of her husband's one-half interest in the marital residence to Land America Commonwealth Title Ins. Co. ("Commonwealth"). The Kolozetkis owned real property in Newport as joint tenants with rights of survivorship. The property was their home- stead and was mortgaged to Sugar River Bank. In 2005, Dorothy filed for divorce. Shortly thereafter, the Family Court entered an order enjoining the Kolozetskis from transferring or encumbering any

property until their divorce was final. While the divorce was pending, John forged his wife's signature on a notarized power of attorney. Using the fraudulent power of attorney, John refinanced the mortgage on the Kolozetkis' property with Lake Sunapee Bank. John took approximately \$100,000 in cash after the first mortgage was paid. John never repaid the loan. The divorce became final in 2007. Thereafter, Lake Sunapee filed suit to recover its loan. The Kolozetkis' property was sold pursuant to an agreement between Dorothy and Lake Sunapee. The property sold for \$225,000. The court awarded approximately \$50,000 of the proceeds to Lake Sunapee as reimbursement for having paid off the prior mortgage. Half of the remaining proceeds were disbursed to Dorothy and the remaining half was held in escrow pending the trial court's consideration of Dorothy and Lake Sunapee's claims. During this period, Commonwealth paid Lake Sunapee pursuant to a title policy and stepped into the shoes of Lake Sunapee for the remainder of the litigation. Because John had executed the mortgage in favor of Lake Sunapee, the trial court found that Commonwealth (Lake Sunapee) was entitled to John's interest in any proceeds derived from the property. The trial court awarded the escrowed funds to Commonwealth (Lake Sunapee). Dorothy appealed arguing she was entitled to the funds because the mortgage was void as a result of fraud. However, the appellate court affirmed the trial court's decision holding that John had conveyed his interest to Lake Sunapee and, therefore, Commonwealth (Lake Sunapee) was entitled to the remaining 50% held in escrow notwithstanding the fraud.

Recoupment: title company's claim against seller based on affidavit given at closing survives motion to dismiss for lack of standing

In re Peterson, 2011 WL 672004 (Bkrtcy. D. Neb. February 17, 2011) (denying motion to dismiss).



2010-2011 Cases of Interest to Title Insurance Litigators

Peterson sold her home and at the closing signed an owner's affidavit stating she did not have any unpaid bills or claims against the property and that there were no unsatisfied judgments of record against her. The purpose of the affidavit was to induce Midwest Title to issue Peterson's seller [should this be BUYER?] a title insurance policy, and the affidavit also contained an indemnification and hold harmless agreement in favor of Midwest and Old Republic Title Insurance Company. A day before Peterson signed the affidavit, a judgment was entered against her for failure to pay for carpet that she had purchased for the home. The transaction closed without the judgment being satisfied. Peterson walked away from the closing with \$62,000. A year later, Peterson filed Chapter 7. Midwest Title then brought a dischargeability proceeding against Peterson based on the affidavit, arguing that its claim was non-dischargeable because it was based on a "false pretenses, a false representation, or fraud." Peterson moved to dismiss arguing Midwest lacked standing because she never owed any debt to Midwest. Because the judgment had not yet been enforced and because Midwest Title had not yet paid the judgment holder, the district court characterized Midwest Title's claims as "contingent and unliquidated," but refused to hold that Midwest Title lacked standing thus denying the motion to dismiss.

I. Tort Liability

Tort Liability: insurer that voluntarily undertakes to advise purchaser at closing may be subject to claims of negligence

Cocco v. Hamilton, 2010 WL 2011003 (N.J. Super. May 17, 2010) (reversing summary judgment). Kosta owned marina property and entered into a lease-purchase agreement with Cocco. During the period of the lease, Cocco contracted to sell the marina property to Hamilton. Hamilton in turn contracted to sell a lot

within the marina property to York. Prior to the closing on York's contract, Hamilton learned of Cocco's contract with Kosta and sued Cocco for reformation of their purchase and sale agreement and filed a lis pendens on the property. Cocco also sued Hamilton for eviction. Hamilton then struck a deal with Kosta to purchase the property from him directly, with a portion of the proceeds coming from the sale of the lot to York. At the closing, York learned of Cocco and the lis pendens, but was reassured by Commonwealth's employee who was closing the transaction that because Cocco was not going to be in title at the end of the transaction he did not need to be at the closing. After York took title and was issued a Commonwealth policy, Cocco sued everyone and filed a lis pendens. York then turned around and sold the lot at \$200,000 profit and filed a crossclaim against Commonwealth for negligence, breach of policy, consumer fraud and bad faith. The trial court granted Commonwealth's motion for summary judgment on York's crossclaim. On appeal, the New Jersey superior court reversed, holding that Commonwealth voluntarily assumed to give York advice by telling him that Cocco did not need to attend the closing and that numerous issues of material fact remained.

Tort Liability: title insurer cannot be liable for negligent misrepresentations as to the status of title where neither an abstract nor title insurance policy are issued

Soifer v. Chicago Title Company, 114 Cal. Rptr. 3d 1 (Cal. App. 2 Dist, August 10, 2010) (affirmed). Soifer brought this appeal seeking to overturn the trial court's order sustaining a demurrer to his first amended complaint. In late 2007, Soifer was purchasing real estate in foreclosure. An instrumental part of his business required him to understand whether the foreclosing lender held the senior mortgage on the property. To secure this information, he entered into an oral agreement with Miguel



2010-2011 Cases of Interest to Title Insurance Litigators

Escutia, a Chicago Title agent, whereby Chicago Title agreed to provide Soifer yes or no answers via e-mail concerning the seniority of the foreclosing lender. Soifer relied on these e-mails in deciding whether or not to bid at the foreclosure sale. In exchange for the information, Soifer promised to place business with Chicago Title when the property was resold. Soifer never sought or obtained a title report or an abstract on the properties. In March 2008, Soifer requested seniority status concerning certain property in Encino, California. Chicago Title allegedly advised Soifer that the foreclosing lender held the senior mortgage on the property. However, the lender was actually junior to a first mortgage in the amount of \$1,600,000. Soifer allegedly relied on the inaccurate information he received from Chicago Title when he purchased the property subject to the first mortgage for \$1,000,000. He then brought the underlying lawsuit against Chicago Title for negligence and negligent misrepresentation seeking to recover his loss. In California, a title insurance company cannot be held liable for inaccurate information in a preliminary report of title. Status of title requires an abstract. Because Soifer did not purchase an abstract of title for the property or a title insurance policy, Chicago Title could not be held liable for Soifer's loss. Accordingly, the appellate court affirmed the trial court's ruling based on existing precedent that a title company cannot be charged with negligence based upon a preliminary report.

Tort Liability: insurer's motion to dismiss negligence claim by company and subsequent owner of insured property denied where insurer may have know of former insured's intention to convey property to its wholly-owned company

Spriggs v. First American Title & Trust Co., 2011 WL 665622 (W.D. Okla. February 15, 2011) (order on motions to dismiss). Spriggs and her mother purchased property with the intention of developing a cemetery.

They obtained title insurance in their individual names from First American. After purchasing the property, Spriggs and her mother transferred it by quit claim deed to their company Riverside Gardens Cemetery. They then learned of a condemnation action as a result of which the City claimed a portion of the property. They made a claim on First American and the claim was denied. Spriggs, her mother, Riverside and Sprigg's sister, a co-owner of Riverside, sued First American for breach of contract, negligence and breach of fiduciary duty. First American moved to dismiss on the ground that Sprigg and her mother's interest in the property had been alienated, they retained no interest in the property nor any liability from the transfer. First America also moved to dismiss because Riverside was not an insured. Spriggs argued that she retained the right to make a claim because First American knew of her plan, that Riverside was going to hold title to the property, and failed to provide her with the policy jacket with the operative provisions and to advise her that the coverage under the policy would terminate if she transferred the property by quit claim deed. The district court held that there was a question of fact at this stage as to whether First American knew of Sprigg's plan and if so whether it was entitled to rely on the undelivered provisions of the policy and whether its knowledge gave rise to a duty to Riverside, neither an insured nor beneficiary of the policy. The district court accordingly denied First American's motion to dismiss as to Riverside but dismissed Sprigg's claim on the basis that she had transferred all her interest in the property and no longer had any liability.

Tort Liability: claims by insured of vicarious liability for breach of fiduciary duty, agent's breach of oral contract, and promissory estoppel against title insurer not barred by the economic loss rule

Testa v. Southern Escrow and Title LLC, 36 So. 3d 713 (Fla. 1st DCA April 13, 2010) (reversing in part



2010-2011 Cases of Interest to Title Insurance Litigators

and affirming in part final judgment dismissing multi-count complaint). Testa brought a 34-count complaint against Southern and Commonwealth based on facts arising out of a title insurance policy coverage dispute. The causes of action included breach of contract, negligence, fraud, breach of fiduciary duty, equitable and promissory estoppel, intentional infliction of emotional distress, FDUTPA, RICO, and even loss of consortium. The trial court held that Testa only had a breach of contract count and that his other claims were barred by the economic loss doctrine. Testa then dismissed his contract count and the trial court entered final judgment dismissing all counts with prejudice. On appeal, the 1st DCA upheld the trial court's decision but, noting it would be very unlikely but not impossible that Testa could allege ultimate facts in support of these claims, held that three counts: (i) vicarious liability for the agent's breach of fiduciary duty, (ii) breach of oral contract with agent to procure specific coverage, and (iii) promissory estoppel. [MISSING WORD(S)? HELD THAT 3 COUNTS WHAT??]

J. Other

Ethical Screens: if law firm adequately screens attorney with confidential information, it may refute rebuttable presumption of imputed knowledge

Kirk v. First American Title Ins. Co., 108 Cal. Rptr. 3d 620 (Cal. App. April 7, 2010). The California appellate court held that the principle that an attorney, who is prohibited from accepting a representation adverse to a client because he has obtained confidential information from the client that would be material to the representation, does not automatically disqualify his firm from undertaking the adverse representation. Instead, a rebuttable presumption is created which may be refuted if the law firm adequately screened the attorney from the others at the firm involved in the adverse representation.

Removal: to remove an action to federal court, defendant must show by a preponderance of the evidence that the jurisdictional amount-in-controversy requirement has been met and may do so with extrinsic evidence

Spottswood v. Stewart Title Guaranty Co., 108 Cal. Rptr. 3d 620 (S.D. Alabama April 16, 2010) (motion to remand denied). The Spottswoods filed this action against Stewart Title seeking to recover damages on a title insurance policy. The Spottswoods sought coverage for a loss of more than seven feet of bay front property. The coverage limits of the policy were approximately \$1.8 million. The court, on Stewart Title's motion for removal, removed the action to federal court on grounds of diversity having found that the damages sought were in excess of \$75,000. In response, the Spottswoods filed a motion to remand the action back to the state court. In support of their motion, the Spottswoods contended that Stewart Title failed to establish the jurisdictional amount of \$75,000 by a preponderance of the evidence and that the evidence Stewart Title submitted should not have been considered. The court disagreed with the Spottswoods and ruled that extrinsic evidence may be considered by the court to determine whether the jurisdictional amount has been satisfied.

Foreclosure: borrower's "show me the note" defense lacks merit in non-judicial foreclosure

Grey v. First American Title Ins. Co., 2010 WL 1962323 (D. Ariz. May 14, 2010) (granting motion to dismiss). First American recorded a notice of sale on property owned by Grey after she failed to meet her obligations under a deed of trust originally in favor of MERS. Grey filed a lawsuit against First American seeking to force First American to produce proof of the note and to stop the sale. Noting the difference between Arizona and judicial foreclosure states, the district court noted that the UCC provides that anyone who is (i) a holder of the instrument, (ii) a nonholder



2010-2011 Cases of Interest to Title Insurance Litigators

in possession of the instrument who has the rights of the holder, or (iii) a person not in possession of the instrument but entitled to enforce it pursuant to section 47-3309, is entitled to enforce an instrument. In light of this, the district court held that Grey's "show me the note" defense lacked merit and granted First American's motion to dismiss.

Declaratory Judgment: insurer's declaratory judgment action dismissed in light of insured's prior, pending state court action for defense and coverage

Stewart Title Co. v. Investors Funding Corp., 2010 WL 1962323 (D. Hawaii May 11, 2010) (granting motion to dismiss). IFC made a mortgage loan secured by a mortgage on two properties and Stewart issued a lender's policy insuring the lien of IFC's mortgage on only one of the properties. When a dispute arose between IFC and its borrower as to both properties, IFC sought a defense and coverage as to both properties. Stewart offered a defense of only one of the properties and IFC filed a third party complaint against Stewart in the underlying state court action seeking coverage and defense as to both properties. Stewart filed a declaratory judgment action in federal court seeking a determination as to its obligations under the policy and IFC moved to dismiss in light of the ongoing proceedings in state court. The Hawaii District Court agreed and dismissed Stewart's action. After determining there was an actual case or controversy, the district court then considered various discretionary factors including the fact that Stewart's action involved a needless determination of state law insurance issues, appeared to be forum shopping, would be duplicative of the state court action, would only reserve part of the controversy, and would lead to entanglement.

Dismissal: plaintiff's motion for voluntary dismissal denied where dismissal would result in legal prejudice to the defendant

Columbia Community Credit Union v. Chicago Title Ins. Co., 2010 WL 1992225 (W.D. Wash., May 17, 2010) (motion to dismiss denied). Columbia's motion to amend its complaint and add CUMIS as a party was denied as untimely and prejudicial to Chicago Title. Thereafter, Columbia filed a motion for voluntary dismissal. Columbia sought dismissal in order to bring a new action against Chicago Title and CUMIS. Chicago Title opposed Columbia's motion for voluntary dismissal. Chicago Title argued it had expended time and effort preparing for trial and Columbia had not shown sufficient explanation for the need to dismiss the action without prejudice. Chicago argued that if dismissal was granted it should be with prejudice. Rule 41(a)(1), Fed. R. Civ. P. provides that an action may be dismissed at the request of the plaintiff only by court order. Case law clearly holds a plaintiff has no right to dismiss an action without prejudice where the defendant will suffer legal prejudice. To determine whether Chicago Title would suffer legal prejudice as a result of dismissal, the court considered Chicago Title's efforts and expense preparing for trial and Columbia's explanation for the dismissal. The court determined Columbia's explanation for dismissal was insufficient and, therefore, denied Columbia's motion to dismiss. The court noted that Columbia could file a separate action against CUMIS and found no reason to Chicago Title should be prejudiced by a dismissal.

Expert Witness: expert testimony as to industry custom and practice admissible in connection with court's interpretation of policy

Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co., 2011 WL 204619 (E.D. Penn. January 20, 2011) (order on motion in limine). In 1988, PMI purchased land from Liberty Mills and at that time entered into a declaration of restrictions which gave Liberty Mills the right to refuse approval of future purchasers of the property and an option to repurchase



2010-2011 Cases of Interest to Title Insurance Litigators

in some circumstances. In 2001, PMI took a loan from Nationwide and Commonwealth issued a policy and an ALTA 9 Endorsement. Schedule B of the policy excepted the Declaration and the Endorsement provided coverage for “any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the land which, in addition . . . provides for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant.” PMI defaulted and, in lieu of foreclosure, gave Nationwide a deed in lieu and Nationwide attempted to sell to a third party. Liberty Mills’ successor invoked its rights under the Declaration and refused to approve the buyer. Nationwide made a claim and Commonwealth denied it. Nationwide filed suit, and Commonwealth persuaded the court on its motion to dismiss that the rights invoked were expressly excepted from coverage because Schedule B listed the Declaration. On appeal the Third Circuit ruled that to except coverage for a right of refusal, Commonwealth was required to expressly list that right, and not merely the Declaration in which it was imbedded, in Schedule B. On remand, Commonwealth took up an alternative argument that the rights invoked in the Declaration were use restrictions, not “restrictions on the land,” and thus not covered under the Endorsement. To support this argument, Commonwealth obtained expert testimony from J. Bushnell Nielsen. Nationwide sought to exclude that on multiple grounds. The district court entered an order ruling, among other things, that, although expert testimony is not admissible as to the interpretation of a policy, the court must look to the parties’ intentions. Even where those intentions are clear and the terms of the policy unambiguous, however, the court may look to industry custom and practice in interpreting a policy and expert testimony as to that custom and practice is admissible. Nielsen’s testimony about the title insurance industry’s use of the phrase “covenants, conditions or restrictions on the land” and how title

insurers classify transfer restrictions and use restrictions was thus permissible. His testimony as to the direct restraints and indirect restraints on alienation were impermissible as conclusions of law because they were not based on his specialized knowledge and were supported by legal documents as opposed to industry custom and practice.

Forum: lender’s choice of forum in Texas for breach of closing protection letters issued in Florida should not be disturbed one week before trial where case has been pending for three years

In re Old Republic National Title Ins. Co., 2011 WL 345676 (Tex. App. February 1, 2011) (denying petition for writ of mandamus). In early 2009, AmericanHomeKey sued Old Republic for violation of closing protection letters in connection with ten closings. After the parties unsuccessfully mediated and just a week before trial, Old Republic filed a motion to dismiss for forum non conveniens to facilitate refiling the case in Florida. Old Republic argued that the loans were made in Florida, on real property in Florida, that the borrowers who AmericanHomeKey argued had committed fraud were all located in Florida, and that it was also a Florida company located in Florida. AmericanHomeKey argued that it was a Texas company with all of its corporate and expert witnesses located in Texas, and that it intended to call only two witnesses in Florida and that it was willing to travel to Florida to take their depositions. The trial court denied Old Republic’s motion and Old Republic sought a writ of mandamus. Considering the public and private factors involved, the Texas appellate court held that the balance of factors was not so heavily weighted in favor of Old Republic that AmericanHomeKey’s choice of forum should be disturbed, particularly in light of the length of time the case had been pending and the fact that trial was merely a week away.

II. Florida State Cases

A. Equitable Subrogation

Equitable Subrogation: equitable subrogation may apply even where refinancing lender has constructive notice of existing second mortgage

Aurora Loan Services, LLC v. Senchuk, 36 So. 3d 716 (Fla. 1st DCA April 13, 2010) (reversing summary judgment). In 2005, the Senchuks gave a first mortgage to Wells Fargo and a second mortgage to the Barrys. In 2006, the Senchuks obtained a mortgage from Aurora in an amount sufficient to satisfy both the Wells Fargo and Barry mortgages, but only the Wells Fargo mortgage was paid and satisfied of record. Aurora filed a foreclosure naming the Barrys and they sought a determination that their mortgage was superior under Florida's recording statute to Aurora's subsequently recorded mortgage. The trial court granted the Barrys' motion for summary judgment over Aurora's objection and assertion of the doctrine of equitable subrogation. On appeal, the 1st DCA summarized Florida law on equitable subrogation and expressly disagreed with the Middle District's opinion in the *Picker* case, which held that constructive notice of the original junior lien bars the application equitable subrogation based on a misinterpretation of the Florida Supreme Court's opinion in *Boyle*. The 1st DCA held that the trial court erred in holding that *Boyle* barred the application of equitable subrogation where a refinancing lender had constructive notice of a second lien holder. The 1st DCA also held equitable subrogation cannot be applied to prejudice the junior lien holder, prejudice is determined at the time of foreclosure, and the new lender is entitled to priority only to the extent of the original loan.

Equitable Subrogation: refinancing lender entitled to equitable lien to the extent prior mortgage was

satisfied even if it had knowledge of forged deed

Tribeca Lending Corp. v. Real Estate Depot, Inc., 42 So. 3d 258 (Fla. 4th DCA July 14, 2010) (affirming in part and reversing in part summary judgment and remanding for corrections). Colonial instituted mortgage foreclosure proceedings against the Thortons. Shortly before the sale, the Thortons entered into sale leaseback agreement with Real Estate Depot (RED) pursuant to which they deeded the property to RED. RED then bid on the property and won, but, instead of paying, it withdrew its bid and forfeited its deposit. When the Thortons found out about this and that Colonial had set another date for the foreclosure, they tried to rescind the sale and leaseback. When this failed, they forged a quit claim deed from RED back to them and obtained a mortgage loan from Tribeca, proceeds from which were used to satisfy the Colonial mortgage. RED then sued seeking to quiet title. Tribeca asserted a claim to foreclose its mortgage or an equitable lien on the property. RED raised unclean hands as a defense to Tribeca's foreclosure arguing that it should have been aware of the forged deed based on the affidavit of forgery that been recorded and irregularities in the closing. Tribeca moved for summary judgment on the equitable lien and the court granted the motion. RED appealed arguing that Tribeca was not entitled to an equitable lien and that there were issues of material fact precluding summary judgment. The 4th DCA summarized the principals surrounding equitable lien and equitable subrogation and held that Tribeca was entitled to an equitable lien to the extent the mortgage loan proceeds went to pay of the Colonial mortgage even if it had known about the forged deed and that RED's unclean hands defense failed as a matter of law.

Equitable Subrogation: lender that fails to note and pay off prior recorded mortgage with due-on-sale clause and thus harms the prior mortgagee's



2010-2011 Cases of Interest to Title Insurance Litigators

position is not entitled to be subrogated to position of purchase money mortgage satisfied from lender's loan

Velazquez v. Serrano, 43 So. 3d 82 (Fla. 3d DCA July 28, 2010). Serrano purchased the subject real property from Velazquez with the proceeds from two purchase money mortgages in favor Hayhurst Mortgage which were recorded at closing. After the closing, Serrano gave Velazquez a mortgage for the balance of the purchase price. The Velazquez mortgage contained a due-on-sale clause and was recorded. The following year Montes purchased the property from Serrano with the proceeds of mortgage loan from WMC. The proceeds from the WMC mortgage were used to satisfy the Hayhurst mortgages, but the title commitment failed to identify the Velazquez mortgage and it was not paid off. Instead the remaining proceeds were given to Serrano. When the WMC mortgage and the Velazquez mortgage went into default, separate foreclosure actions were filed and consolidated. The trial court granted summary judgment in favor of the WMC mortgage on the basis of equitable subrogation, stating that otherwise Velazquez would be unjustly enriched by the payment of the Hayhurst mortgages, which were superior to Velazquez mortgage and which Velazquez would have been required to satisfy to claim a first lien position. Velazquez appealed arguing her mortgage recorded before the WMC mortgage had priority by virtue of Florida's recording statute. On appeal, the 3rd DCA agreed and held that the bank's failure to note and payoff Velazquez's properly recorded mortgage harmed Velazquez. The due-on-sale clause entitled Velazquez to payment when the property was sold and any recovery after foreclosure was speculative as opposed to the certain payment at closing.

Equitable Subrogation: settlement statement alone insufficient evidence that prior mortgages

have been satisfied and could serve as a basis for equitable subrogation

Brotheridge v. Option One Mortgage Corp., 2010 WL 4628578 (Fla. 2d DCA November 17, 2010) (reversing summary judgment). This case involved a refinance mortgage taken by Mrs. Brotheridge to help fund her struggling business. The broker appears to have promised her one interest rate but at closing the loan documents reflected a significantly higher one. The notary who conducted the execution of the documents in Mrs. Brotheridge's home appears to have falsified the notarization on the mortgage and someone forged Mr. Brotheridge's signature on the loan application, the note and mortgage. After the loan was made, Mrs. Brotheridge made no payments and attempted to rescind the loan. Option One assigned its interest in the loan to GRP Loan, LLC and GRP moved for summary judgment on the basis of equitable subrogation for the amount of the loan proceeds used to pay off two prior mortgages. The only evidence showing the prior mortgages had been satisfied that GRP submitted in support of its motion was the settlement statement. The trial court granted summary judgment. On appeal, the 2d DCA expressed concern about the misconduct at the closing and indicated it was not clear whether it could be attributed to GRP. Given the "irregularities" at closing, the 2d DCA reversed holding it was "unwilling to assume that the settlement statement at the closing is dispositive of this foreclosure" where there was no proof that the prior notes and mortgages were satisfied. The 2d DCA also stated that, even if the prior notes had been satisfied, whether an equitable lien under a theory of equitable subrogation should give the lender the right to immediate foreclosure without giving the owner the opportunity to make payments.

B. Foreclosure

Foreclosure: trial court erred in denying unopposed motion to cancel and vacate sale as a result of loan modification agreement

Wells Fargo Bank N.A. v. Lupica, 36 So. 3d 875 (Fla. 5th DCA June 4, 2010) (reversing final order denying unopposed motion to cancel sale). This opinion continues the saga of the trial court that had stamped “denied” on Wells Fargo’s unopposed motions to cancel a foreclosure sale due to a loan modification agreement reached by the parties. The 5th DCA previously relinquished jurisdiction because it found the stamped motions did not constitute final appealable orders of the court and gave express instructions to the trial court to enter a proper order. The trial court entered an order denying the motions for failure to attach a copy of the settlement agreement. On appeal, the 5th DCA found that settlement is favored and that it was gross abuse of the trial court’s discretion to deny the motion for lack of attaching the settlement agreement, particularly where not challenged by the other party.

Foreclosure: lender’s affidavit that all allegations in complaint are true insufficient to refute borrower’s lack of notice defense

Lazuran v. Citimortgage, Inc., 35 So. 3d 189 (Fla. 4th DCA June 9, 2010) (reversing final summary judgment of foreclosure). The 4th DCA reversed the trial court’s grant of summary judgment to Citi holding that Citi’s allegation that all conditions precedent had been fulfilled and its affidavit which merely stated that each and every allegation in the Complaint was true were insufficient to refute the borrower’s defense that Citi failed to provide notice of the acceleration.

Foreclosure: assignee made prima facie showing of ownership by submitting original note, mortgage, and assignment

Lizio v. McCullom, 36 So. 3d 927 (Fla. 4th DCA June 9, 2010) (reversing involuntary dismissal). Lizio, the assignee of a note and mortgage given by McCullom, moved to foreclose the mortgage. At trial, Lizio introduced into evidence the original note, mortgage and assignment and the PR of the prior mortgagee testified as to these instruments and the fact of the assignment. After trial McCullom moved for involuntary dismissal on the basis that Lizio did not testify and produced no evidence that the mortgage and note had not been subsequently assigned. The trial court granted the motion, but on appeal the 4th DCA reversed holding that Lizio had met his burden of providing a prima facie case of ownership by submitting the note, mortgage and assignment.

Foreclosure: holder of a note endorsed in blank is entitled to enforce it

Riggs v. Aurora Loan Services, LLC, 36 So. 3d 932 (Fla. 4th DCA June 16, 2010) (granting rehearing and replacing prior opinion. The 4th DCA reversed its prior opinion on rehearing in this case, holding that Aurora had sufficiently proved it was entitled to summary judgment by producing the original mortgage and note, endorsed in blank, and submitting affidavits that it was the owner and holder of the note. The UCC provides that the holder of a note endorsed in blank is entitled to enforce it. In addition, the 4th DCA noted that the note and endorsement are self-authenticating documents and thus the authenticity of the signatures on them are deemed admitted unless specifically denied in the pleadings.

Foreclosure: sale may be reversed if price is grossly inadequate and there is mistake, fraud or irregularity in sale, but reversal is not appropriate where owner had final order and failed to redeem

Aegis Properties of South Florida, LLC v. Avalon Master HOA, Inc., 37 So. 3d 960 (Fla. 4th DCA June 16, 2010) (reversing order setting aside foreclosure



2010-2011 Cases of Interest to Title Insurance Litigators

sale). The HOA brought an action to foreclose a lien for fees due. The trial court entered a default final judgment in the presence of the homeowner. The property was sold to Aegis for \$4,600, and the homeowner failed to redeem prior to the sale. After the sale, however, the homeowner filed an emergency motion to set the sale aside, alleging she had misunderstood the trial court's order. The trial court granted her motions and she submitted the full amount of the lien. On appeal, the 4th DCA noted that foreclosure sales are reversible if the sales price is grossly inadequate and there is some mistake, fraud or irregularity with the sale. Neither was the case here, the 4th DCA held noting that the trial judge handed the homeowner a copy of the default judgment outlining her right of redemption.

Foreclosure: voluntary dismissal entitles defendant to be determined prevailing party for purposes of award of reciprocal attorney's fees

Shepherd v. Deutsche Bank, 38 So. 3d 825 (Fla. 5th DCA June 18, 2010) (reversing denial of motion for attorneys fees). Deutsche Bank filed a foreclosure action against Shepherd and obtained a final judgment that was reversed for failure of service. Deutsche Bank then filed another foreclosure and Shepherd moved to dismiss on the basis of the original pending action. Deutsche Bank then voluntarily dismissed the first action and Shepherd moved for fees as the prevailing party, which the trial court denied pending a determination on the merits of the second case. On appeal, the 5th DCA held that the trial court was without authority to defer an award of fees and costs to which Shepherd was reciprocally entitled under section 57.105 and rule 1.420(d). A party may not take a strategic dismissal and avoid the other party being determined the prevailing party.

Foreclosure: federal agencies have unlimited time to foreclose mortgages

LPP Mortgage Ltd. v. Tucker, 48 So. 3d 115 (Fla. 3d DCA November 10, 2010) (reversing summary judgment on rehearing). The 3d DCA held that the federal six year statute of limitation pursuant to 28 USC 2415(a) applies to foreclosure of a federal agency mortgage even though the US Government has unlimited time to bring an action to establish title to property pursuant to 28 USC 2415(c) because mortgages do not constitute an interest in real property. Reversed and remanded on motion for rehearing because the federal government has determined that the government may file to foreclose a mortgage at any time.

Foreclosure: hearing on motion for final judgment awarding foreclosure and fees which defendant attended did not violate due process even though the matter had not been noticed for trial

Zumpf v. Countrywide Home Loans, Inc., 43 So. 3d 764 (Fla. 2d DCA July 23, 2010) (affirming final judgment). The trial court granted Zumpf's motion to set aside an order granting it summary judgment due to miscalculations and ordered Countrywide to file a new motion for summary judgment. Instead, Countrywide filed a motion for final judgment, scheduled a hearing and sent exhibit and witness lists to Zumpf. At the hearing, Zumpf acting pro se argued that Countrywide's motion was not proper and that it was required pursuant to the court's prior order to file another motion for summary judgment. The hearing proceeded over these objections, testimony was taken and the court entered final judgment against Zumpf. She appealed and for the first time raised the issue that trial had not been noticed per Rule 1.440 and that an award of fees was not appropriate without a separate hearing. The 2d DCA held that she failed to preserve these issues and, although the hearing was irregular, Zumpf was not denied due process.

Foreclosure: assignee of nonholder in possession of note with rights of holder is entitled to foreclose



2010-2011 Cases of Interest to Title Insurance Litigators

Taylor v. Deutsche Bank National Trust Co., 44 So. 3d 618 (Fla. 5th DCA August 6, 2010) (affirming final judgment). Taylor challenged Deutsche Bank's standing to bring its mortgage foreclosure action, specifically arguing that MERS was not the beneficial owner of the note and mortgage in favor of First Franklin and that thus the assignment of same from MERS to Deutsche Bank was insufficient. The trial court granted summary judgment in favor of Deutsche Bank. On appeal, the 5th DCA noted that the mortgage named MERS as nominee for the lender with all rights of the lender, including the right to foreclose and sell the property. The 5th DCA further pointed out that Section 673.3011 defines a person entitled to enforce an instrument to include a "nonholder in possession of the instrument who has the rights of a holder." Here, although the note was not endorsed and did not contain an allonge or assignment, the 5th DCA held that the assignment of the mortgage and note from MERS, a nonholder in possession with rights of a holder, properly transferred the note and mortgage to Deutsche Bank.

Foreclosure: mere allegation that bank is assignee, without an assignment or other conveyance will not support summary judgment

Kontos v. American Home Mortgage Servicing, Inc., 40 So. 3d 929 (Fla. 1st DCA August 10, 2010) (vacating final summary judgment). The 1st DCA vacated final judgment in favor of American Home because, although American Home alleged it was the assignee of the original holders of the mortgage and note, the record lacked an "assignment or comparable transaction."

Foreclosure: a hearing is required to determine if bank's failure to appear at foreclosure sale was the result of a mistake sufficient to allow bank to set sale aside

U.S. Bank, N.A. v. Bjeljac, 43 So. 3d 85 (Fla. 5th DCA Sept. 3, 2010) (affirmed in part, reversed in part, remanded). Plaintiff bank obtained a final judgment of foreclosure and the mortgaged property was sold to a third party at a properly noticed public sale. Bank filed an objection to the sale and a motion to set aside, which was denied without hearing. Bank then filed a motion for rehearing and supplemental objection to the sale, arguing the sale should be set aside since it mistakenly failed to send a representative to the sale, resulting in an inadequate bid price. Without a hearing, the trial judge denied this motion. Bank appealed the denial of both motions. On appeal, the court affirmed denial of the first motion to set aside the sale, holding that the motion failed to meet basic requirement to state the grounds therefore with particularity. As to the second motion, the court noted that inadequacy of bid price alone is no basis to set aside a judicial sale. However, when the inadequacy of price is gross and results from any mistake, accident, surprise, fraud or irregularity on the part of either the purchaser or other person connected with the sale, with resulting injustice to the complaining party, equity will act to prevent the wrong result. The court found that the question of whether the bank's failure to have a representative present at the sale was the result of a mistake is inherently factual and requires a hearing. Since the judge held no hearing, there was nothing in the record that would support or refute the bank's allegations of mistake. As such, the court reversed and remanded for hearing.

Foreclosure: severance clause in note cures illusory precondition to extension of loan

Alonso v. Ocean Bank, 43 So. 3d 170 (Fla. 4th DCA September 8, 2010) (affirming summary judgment). Laurel Gardens entered into a multimillion dollar loan agreement with Ocean Bank secured by a mortgage on real property. The promissory note allowed Laurel Gardens to extend the maturity date for an addi-



2010-2011 Cases of Interest to Title Insurance Litigators

tional 12 months if the note was not in default, Laurel Gardens provided evidence of local government approval of a development of regional impact as to the real property (“DRI”), and upon payment of an extension fee. On the maturity date, Laurel Gardens was current but failed to tender evidence of the DRI and the extension fee. Ocean Bank filed an action to foreclose. Laurel Gardens argued it was inequitable to allow Ocean Bank to foreclose because it was not in default, the DRI was no longer a necessary condition of the proposed development, and Laurel Gardens was ready, willing and able to pay the extension fee, but the trial court granted summary judgment on the mortgage, note and personal guarantees. On appeal, Laurel Gardens argued the promise to extend was illusory and based on an impossible precondition because there was no local government DRI designation in St. Lucie County and Ocean Bank should be estopped for not withdrawing the fee from Laurel Garden’s account. The 4th DCA disagreed and affirmed holding that, even if the precondition was illusory, the severance clause cured this problem and the estoppel arguments had not been raised below and lacked any record evidence. *Carlton Fields attorneys David Smith and Cristina represented Ocean Bank at trial and on appeal.*

Foreclosure: mortgagor entitled to redeem by paying the amount specified in judgment before the clerk enters a certificate of sale or as specified in the judgment, whichever is later

Verneret v. Foreclosure Advisors, LLC, 45 So. 3d 889 (Fla. 3d DCA September 15, 2010) (affirming summary judgment). The lender on a \$15,000 credit line brought a foreclosure action. In response, Verneret moved to dismiss and opposed the lender’s motion for summary judgment arguing that she had not signed the mortgage and did not receive its benefits. Noting that Verneret’s signature and her husband’s purported to be on the mortgage and were

both notarized, the trial court denied her motion to dismiss and granted the lender’s motion for summary judgment. Verneret appealed, tendered the amount specified in the final judgment, and asked the DCA to relinquish jurisdiction so that she could file a motion to compel acceptance. The DCA relinquished jurisdiction but the trial court denied her motion to compel. The 3d DCA affirmed summary judgment holding that evidence of fraud must be of the clearest, strongest, and most convincing character and that the trial court had found her self serving statements to be not credible. The 3d DCA reversed the denial of her motion to compel, however, because Section 45.0315 allows a borrower to cure and prevent foreclosure by paying to the lender or the clerk the amount specified in the judgment before the clerk enters a certificate of sale or as specified in the judgment, whichever is later [FRAGMENT – BECAUSE . . . WHAT?].

Foreclosure: summary judgment not appropriate where defendants had not yet answered and parallel foreclosure was pending in different division

Ruscalleda v. HSBC Bank USA, 2010 WL 2292122 (Fla. 3d DCA June 9, 2010). The 3d DCA reversed summary judgment under the unique circumstances of this case where the defendants had not yet answered for denying a motion to continue the hearing on summary judgment, and failing to grant the motion to transfer the case to the division where another foreclosure on the same property was pending.

Foreclosure: proper procedure to seek return of foreclosure bid is to apply to clerk rather than seeking to intervene in foreclosure

STL Realty, LLC v. Bell Plaza Condominium Association, Inc., 45 So. 3d 972 (Fla. 3d DCA October 13, 2010) (affirming denial of motion to intervene). STL moved to intervene in the pending foreclosure in order to seek release of funds deposited with the clerk in excess of the minimum 5% for its



2010-2011 Cases of Interest to Title Insurance Litigators

foreclosure bid. The trial court denied the motion to intervene, and STL appealed the denial. Indicating that the correct procedure was for STL to file an application to the clerk for the return of its funds, the 3d DCA affirmed holding that the trial court did not abuse its discretion in denying STL's motion.

Foreclosure: part of lender's burden in moving for summary judgment of foreclosure is to address defendant's affirmative defenses and summary judgment will be reversed where defenses are not addressed

Alejandre v. Deutsche Bank Trust Co. America, 44 So. 3d 1288 (Fla. 4th DCA October 13, 2010) (reversing summary judgment). Deutsche Bank filed a foreclosure action and the borrower, Alejandre, answered and raised various affirmative defenses based on TILA, RESPA and unclean hands. Deutsche Bank moved for summary judgment without addressing the defenses and the trial court granted Deutsche Bank's motion for summary judgment of foreclosure without addressing the defenses in the order. Alejandre appealed, Deutsche Bank failed to file a response brief, and the 4th DCA reversed holding that Deutsche Bank failed to carry its burden on summary judgment by not addressing the affirmative defenses.

Foreclosure: assignee of federal government obtains all of the government's rights, including an unlimited time to file a foreclosure action

LLP Mortgage, Ltd. f/k/a Loan Participant Partners, Ltd. v. Tucker, 48 So. 3d 115 (Fla. 3d DCA November 10, 2010) (granting rehearing and substituting opinion reversing final summary judgment). The Small Business Association, a federal government agency, made a loan to Tucker secured by a mortgage. The loan and mortgage were thereafter assigned to LLP. After a default, LLP filed a foreclosure action against Tucker's property, but the court granted Tucker summary judgment on the basis that the 6 year statute of limitation had run. On appeal, LLP argued

that as an assignee of the federal government it acquired all of the rights of the federal government, including the federal government's unlimited time to foreclose. The 3d DCA agreed and reversed summary judgment in favor of Tucker.

Foreclosure: to challenge loan servicer's affidavit in support of summary judgment, borrower must make a showing of specific fraud as to that affidavit and affiant's deposition testimony as to other mortgage loans is insufficient

Freemon v. Deutsche Bank Trust Co. Americas as Trustee, 46 So. 3d 1202 (Fla. 4th DCA November 10, 2010) (affirming denial of relief from judgment). Deutsche Bank sued to foreclose its mortgage on Freemon's property but Freemon failed to answer and a default was entered against her. Deutsche Bank moved for summary judgment based on an affidavit of the assistant secretary of the servicing company. The court entered summary judgment based on the affidavit, but before the property could go to sale, Freemon moved for relief from judgment. After six months, the court reset the sale and Deutsche Bank obtained title to the property and moved for a writ of possession. Freemon again moved for relief from judgment claiming that the affidavit filed in support of the motion for summary judgment was fraudulent. Deposition testimony of the assistant secretary in another action showed, according to Freemon, that she regularly signed these types of affidavits without personal knowledge. The trial court denied Freemon's motion and she appealed. The 4th DCA held that Freemon's motion was insufficient. She did not deny being in default of the mortgage and did not allege the amounts set forth in the affidavit were incorrect or not due and owing. The 4th DCA held that the deposition testimony take as to another loan was insufficient to show fraud and challenge this affidavit.

Foreclosures: trial court, not plaintiff, has ultimate authority to set sale date



2010-2011 Cases of Interest to Title Insurance Litigators

LR5A-JV v. Little House, LLC, 50 So. 3d 691 (Fla. 5th DCA December 10, 2010) (affirming order setting judicial sale). LR5A obtained a final judgment of foreclosure and, after an appeal determining the homeowner's association's lien for assessments to be inferior to LR5A's first mortgage, the homeowner's association moved the trial court to set a sale date and the trial court entered an order scheduling the sale. LR5A appealed the order arguing that the trial court does not have the discretion to control when, if at all, the sale will take place and, even if it did, it abused its discretion by allowing a junior lien holder to effectively control the sale date. The 5th DCA disagreed holding that section 45.031(1) gives the trial court ultimate authority to order a judicial sale. Noting the association's interest in having its assessments paid, the 5th DCA held that the order was consistent with section 45.031(1), the Foreclosure Task Force's policies and Form 1.996(b) and the court did not abuse its discretion in ordering the sale.

Foreclosure: lender that fails to submit any evidence it owns the note and mortgage at the time of the action and admits through discovery the lack of such evidence is subject to fees

Country Place Community Association, Inc. v. J.P. Morgan Mortgage Acquisition Corp., 51 So. 3d 1176 (Fla. 2d DCA December 29, 2010) (reversing order denying attorney's fees). J.P. Morgan filed a foreclosure action including a count to re-establish a lost note. The copy of the note and mortgage attached to the complaint were in the name of another lender and J.P. Mortgage did not attach any assignment of the note or mortgage to the complaint and no assignment was recorded in the public records. Country Place propounded requests for admission including one as to J.P. Morgan's ownership and possession of the note and mortgage on the date it filed the foreclosure action. J.P. Morgan failed to respond and thus admitted it had no evidence to show it was the

owner and holder of the note and mortgage as of the date it filed the foreclosure action. Country Place then sought and obtained summary judgment and thereafter sought its fees under section 57.105. J.P. Morgan did not file an opposition to the motion for fees, but at the hearing an attorney for J.P. Morgan appeared and asserted he had possession of a valid assignment showing J.P. Morgan had standing to bring the action. Based on this and the idea that J.P. Morgan would be able to file a new action and successfully foreclose the mortgage, the trial court denied the motion for fees. On appeal, the 2d DCA noted J.P. Morgan's failure to file a brief in opposition to the motion for fees, and reversed the trial court order and held that, under the revised statute, Country Place was entitled to fees based on J.P. Morgan's filing the foreclosure when it was not the owner and holder of the note and mortgage, even if J.P. Morgan could ultimately re-file and prevail on its mortgage foreclosure action.

Foreclosure: lender's estoppel and marshalling defense has merit sufficient to support motion to vacate default

Household Finance Corp., III v. Mitchell, 51 So. 3d 1238 (Fla. 1st DCA January 19, 21) (reversing denial of motion to vacate default judgment). Mitchell held a mortgage totaling \$600,000 on four properties owned by the Padots, including one lot on which the Padots' home was built. HFC gave a second and third mortgage on the Padots' home. Mitchell then assigned his mortgage to his father. The Padots then defaulted on the Mitchell mortgage and Mitchell Sr. filed a foreclosure action joining HFC as a defendant. HFC failed to respond after its registered agent was served and Mitchell moved to default. The court granted the default and, subsequently, set the matter for trial. A week before the trial date, HFC filed an emergency motion to quash service, vacate the default and continue trial. HFC submitted



2010-2011 Cases of Interest to Title Insurance Litigators

an employee's affidavit who said she had not gotten a copy of the summons and complaint until recently due to a misfiling. HFC also filed answers asserting, among other defenses, estoppel and marshalling. On the day of trial the court denied HFC's motion finding that, although there was excusable neglect, there was no meritorious defense. The court awarded Mitchell a final judgment of foreclosure. On appeal, the 1st DCA held that a party moving to set aside a default must show (i) excusable neglect, (ii) a meritorious defense, and (iii) reasonable diligence upon learning of the default. If any of these elements is missing, the court must deny the motion, but, if there is reasonable doubt as to whether the party is entitled to relief, the motion must be granted. Here, the 1st DCA held that HFC did not need to show it was likely to prevail on its defenses, only that its defenses were not merely a general denial and are pled with some minimum specificity. The 1st DCA reversed and held that HFC's estoppel and marshalling defense may have some merit.

Foreclosure: laundry list of affirmative defenses insufficient to withstand motion for summary judgment

Tacher v. Bank, 50 So. 3d 1239 (Fla. 4th DCA January 19, 2011) (affirming denial of motion for rehearing). The trial court entered final summary judgment of foreclosure against Tacher over his laundry list of affirmative defenses. He filed a one and a half page motion for rehearing arguing that his defenses had not been conclusively refuted, and the court denied the motion. On appeal, the 4th DCA noted that Tacher made the same argument on appeal without addressing a specific defense or identifying which issues of material fact remained to be tried. The 4th DCA held that Tacher failed to carry his burden of making any reversible error "clearly, definitely, and fully appear."

Foreclosure: purchaser's due process rights violated where it does not receive notice or opportunity to be heard on motion setting aside sale

Gianthony Homes, Inc. v. U.S. Bank N.A., 52 So. 3d 838 (Fla. 5th DCA January 28, 2011) (reversing ex parte order). U.S. Bank obtained a foreclosure judgment and Gianthony and Avonedale were the winning bidders at the sale to which the clerk issued a certificate of title. Thereafter, U.S. Bank filed an "Ex Parte Agreed Motion to Set Aside Foreclosure Sale, Not Issue Certificate of Title and Reset Foreclosure Sale," reciting that Gianthony and Avonedale had agreed to the granting of the motion and reflecting that the motion had been mailed to Gianthony and Avonedale. The trial court entered U.S. Bank's proposed order. On appeal, the 5th DCA relinquished jurisdiction for the trial court to hold an evidentiary hearing at which it was determined that Gianthony and Avonedale had not agreed to the motion, had not been given notice of the motion or proposed order, and had not received the order until after the time for a motion for rehearing had passed. The 5th DCA held that, under these circumstances, Gianthony and Avonedale's procedural due process rights had been violated as they were entitled to receive a copy of the motion and an opportunity to be heard.

Foreclosure: court refuses to strike voluntary dismissal of foreclosure action based on allegations that lender submitted fraudulent assignment

Pino v. The Bank of New York Mellon, 2011 WL 1135541 (Fla. 4th DCA March 30, 2011) (affirming order denying motion to strike notice of dismissal and certifying question). BNY sued to foreclose, alleging a count for lost instrument without attaching an assignment as an exhibit. Pino moved to dismiss on that basis and BNY amended attaching a recent unrecorded assignment dated just prior to the date of the original action. Pino then moved for sanctions alleging the assignment was false and had been



2010-2011 Cases of Interest to Title Insurance Litigators

executed by an employee of the plaintiff's attorney and apparently backdated or at least not properly notarized. Pino set the depositions of the individuals involved in executing, notarizing and witnessing the assignment and also moved for dismissal with prejudice. A day before the hearing, BNY filed a notice of voluntary dismissal under Rule 1.420, and, subsequently, filed another foreclosure action with a different assignment attached. Pino then moved in the original action pursuant to rule 1.540(b) to strike the notice of voluntary dismissal on the grounds that BNY had committed a fraud on the court. The trial court denied Pino's motion. On appeal, the 4th DCA distinguished this case from others where the plaintiff has obtained affirmative relief and then filed a notice of dismissal. Absent affirmative relief or prejudice to the defendant, the 4th DCA refused to grant the motion to strike under Rule 1.540 or its inherent authority. Nevertheless, recognizing the importance of the issue in light of the fact that Pino had argued that BNY should be precluded altogether from asserting its equitable right to foreclose, the 4th DCA certified the following question of great public importance: DOES A TRIAL COURT HAVE JURISDICTION AND AUTHORITY UNDER RULE 1.540(b), Fla. R. Civ. P. OR UNDER ITS INHERENT AUTHORITY TO GRANT RELIEF FROM A VOLUNTARY DISMISSAL WHERE THE MOTION ALLEGES A FRAUD ON THE COURT IN THE PROCEEDINGS BUT NO AFFIRMATIVE RELIEF ON BEHALF OF THE PLAINTIFF HAS BEEN OBTAINED FROM THE COURT? Judge Polen (through retired judge Farmer's words) dissented and would have found that the court had jurisdiction and authority to consider the motion and to grant the relief of striking the notice of dismissal.

Foreclosure: bank and its attorney have a duty to make a reasonable investigation of bank's stand-

ing to enforce mortgage prior to filing suit

South Bay Lakes HOA, Inc. v. Wells Fargo Bank, N.A., 53 So. 3d 1239 (Fla. 2d DCA February 18, 2011) (reversing order denying motion for attorney's fees). Wells Fargo filed an action to foreclose a mortgage on property within the HOA. David Stern's office filed the suit and alleged that Wells Fargo filed the action by virtue of an assignment to be recorded and also asserted a count to enforce a lost note. The original mortgage described property outside of the HOA, but a recorded modification and the lis pendens showed the property to be within the HOA. The owners did not answer but filed a letter indicating they were working out the amounts owed with the servicer. The HOA served requests for admissions including one requesting Wells Fargo to admit it had no documentary evidence that it was an equitable owner of the note and mortgage. Wells Fargo did not respond. The HOA moved for summary judgment and Wells Fargo and its attorney failed to appear and the court granted the HOA's motion, with leave to amend. Based on the HOA's 57.105 motion for sanctions, the HOA moved for its fees. The trial court denied the motion based on the reasoning that some lender would have been entitled to file an action to foreclose the mortgage. The HOA appealed. The 2d DCA noted that the bank's counsel attempted to justify the filing by virtue of the vast volume of cases and held that that fact does not relieve banks or their counsel from "their obligation to file pleadings that are adequately supported by a reasonable investigation prior to suit." Here, the 2d DCA held that the HOA made a prima facie case that the bank and its attorneys knew or should have known the bank did not have standing to bring the suit. If the bank had evidence to refute the claim, it was incumbent upon it to bring it forward to refute the claim but it failed to do so. The 2d DCA thus reversed the trial court's order and declining to award fees.



2010-2011 Cases of Interest to Title Insurance Litigators

Foreclosure: successful purchaser is entitled to notice, opportunity to be heard and evidentiary hearing on motion to vacate foreclosure sale pursuant to rule 1.540(b)

Eyal Avi-Issac v. Wells Fargo Bank, N.A., 2011 WL 711061 (Fla. 2d DCA March 2, 2011) (reversing order granting motion to vacate). Wells Fargo obtained a foreclosure judgment and scheduled the sale. As a result of negotiations with the mortgagor, Wells Fargo attempted to cancel the sale by faxing a request that the sale be cancelled to the court. The sale took place anyway without a Wells Fargo representative being present and Avi-Issac purchased the property for \$2,000. Wells Fargo immediately served an objection to the sale and motion to set aside the sale and the certificate of sale, but the objection was not immediately docketed because it was sent to chambers rather than the clerk. The clerk thereafter issued a certificate of title to Avi-Issac. Wells Fargo then moved to vacate the certificate of title arguing mistake, inadvertence, surprise or excusable neglect under Rule 1.540(b). Wells Fargo submitted an affidavit in support of its motion and a hearing was held. Avi-Issac insisted upon an evidentiary hearing under Rule 1.540(b) as to Wells Fargo's failure to properly object and cancel the sale. The trial court found that the failure to cancel the sale was a mistake of the court, not Wells Fargo, and granted the motion to vacate. On appeal, the 2d DCA disagreed and held that a purchaser at foreclosure sale is entitled to notice and opportunity to be heard on a motion to vacate a sale and an evidentiary hearing.

Foreclosure: date discrepancies regarding acceleration letter and mortgage assignment precluded summary judgment

Sandoro v. HSBC Bank, 2011 WL 801968 (Fla. 2d DCA March 9, 2011) (reversing final judgment of foreclosure after summary judgment). The 2d DCA reversed final judgment of foreclosure, which was

entered after the trial court granted plaintiff's motion for summary judgment. The 2d DCA found that fact issues existed concerning the assignment of the mortgage and whether defendant received proper notice of acceleration. The assignment stated that the mortgage was transferred to plaintiff "on or before" April 3, 2007. It was executed, however, on October 9, 2008, and notarized on October 10, 2008. Additionally, plaintiff alleged that the notice of acceleration was mailed on November 17, 2006, but the letter was dated February 5, 2007, and no proof of mailing was offered. These two date discrepancies, the court found, created issues of fact precluding summary judgment.

Foreclosure: mortgagee did not owe unpaid assessments under § 720.3085 where HOA declaration agreed otherwise because application of statute would impair contractual relationship

Ecoventure WGV, Ltd. v. Saint Johns Northwest Residential Ass'n, 2011 WL 830626 (Fla. 5th DCA March 11, 2011) (reversing final judgment). Mortgagee foreclosed on its mortgage and took title to the subject property at the foreclosure sale. A homeowner's association subsequently sought a judgment against the mortgagee for two years of unpaid assessments under Fla. Stat. § 720.3085, and the trial court held that mortgagee was jointly and severally liable under the statute. On appeal, the 5th DCA noted that the statute was enacted after the mortgage was extended, and the homeowner's association declaration made an express promise that mortgagees would not be fully responsible for the unpaid assessments of its mortgagors. Therefore, the court reversed judgment against mortgagee, holding that the application of § 720.3085 in this case impaired mortgagee's contractual rights under the declaration by "severely, permanently, and immediately chang[ing] the parties' economic relationship . . . a circumstance not supportable under the law."



2010-2011 Cases of Interest to Title Insurance Litigators

Foreclosure: state court foreclosure case may not be removed to federal court based on co-defendants' federal law question cross-claims.

Chevy Chase Bank, F.S.B. v. Carrington, 2010 WL 1854123 (M.D. Fla. May 10, 2010) (remanding case to state court). Plaintiff, first mortgage holder, sued borrower in state court to foreclose its mortgage. Borrower filed a third-party complaint against Flagstar for violation of the Truth in Lending Act ("TILA") and the Real Estate Settlement Procedures Act ("RESPA"). Flagstar removed the case to federal court and moved to join or intervene in the foreclosure action as the second mortgage holder. A precedent from the prior 5th Circuit Court permits third-party defendants to effect removal pursuant to 28 USC 1441(c); however, that precedent did not govern the instant issue because removal here was based on federal law questions in crossclaims rather than third-party claims. The propriety of a removal is determined only after the parties have been realigned according to their actual interests in the cause. Flagstar, the holder of a second mortgage, should have been named as a defendant in the foreclosure action and borrower's TILA and RESPA claims against Flagstar should have been filed as cross-claims rather than third-party claims. According to the well-pleaded complaint rule, borrower's TILA and RESPA claims did not appear in the plaintiff's well-pleaded complaint; therefore, the court remanded the case to state court.

Foreclosure: possession of note payable to bearer is sufficient to establish bank as holder of note and affidavit from assignor affirming ownership is proof of right to foreclose mortgage

Isaac v. Deutsche Bank National Trust Co., Case No. 4D09-3036 (Fla. 4th DCA Apr. 6, 2011) (affirming summary judgment). Mortgagor appealed summary judgment in favor of bank, alleging that bank failed to establish standing. The bank filed the original note,

an allonge made payable to bearer, and an affidavit from the original assignee from whom the bank obtained ownership, affirming bank's ownership of the note and mortgage. The 4th DCA affirmed summary judgment, holding that bank was the holder of the note by virtue of its possession of the note, which was made payable to bearer. The court also noted that the affidavit provided proof of bank's right to foreclose on the mortgage.

Foreclosure: bank failed to establish standing to foreclosure where note evidenced endorsement to other bank as trustee

Khan v. Bank of America, N.A., Case No. 5D10-3288 (Fla. 5th DCA Apr. 8, 2011) (reversing final summary judgment of foreclosure). The 5th DCA reversed final summary judgment of foreclosure in favor of Bank of America for failure to establish standing to foreclose the mortgage as a matter of law. Despite allegations in the unverified complaint that Bank of America was the owner and holder of the note, the note attached to the complaint contained an endorsement from Bank of America to Wells Fargo Bank, N.A., as trustee for the holders of Banc of America Mortgage Securities, Inc. Mortgage Pass-Through Certificates, Series 2006-B.

Foreclosure: failure to hold evidentiary hearing on motion to rescind foreclosure sale was an abuse of discretion where no testimony or affidavit was presented to support the motion

Arsali v. Deutsche Bank Nat'l Trust Co., Case No. 4D10-3830 (Fla. 4th DCA Apr. 6, 2011) (reversing denial of motion for rehearing of prior order rescinding and rescheduling foreclosure sale). Court granted final judgment of foreclosure in favor of bank, and scheduled foreclosure sale. Bank filed a motion to cancel the foreclosure sale to determine whether homeowner qualified for a loan modification, but the trial court failed to enter an order cancelling the



2010-2011 Cases of Interest to Title Insurance Litigators

foreclosure sale, at which appellant purchased the property. The trial court granted bank's emergency motion to rescind the foreclosure sale at a UMC hearing. Appellant did not receive notice of the hearing. The trial court denied appellant's motion for rehearing. The 4th DCA reversed, holding that the trial court abused its discretion in summarily granting the bank's motion without holding an evidentiary hearing to determine whether the sale should have been set aside, where no affidavit was attached to the bank's motion, and no testimony was presented at the hearing.

C. Lis Pendens

Lis Pendens: difference in value of property from the time lis pendens is file to the time it is terminated plus consequential damages determines damages based on filing of lis pendens notice

FCD Development LLC v. South Florida Sports Committee, Inc., 37 So. 3d 905 (Fla. 4th DCA May 26, 2010) (reversing final judgment). A final judgment awarded SFSC damages based on FDC's notice of lis pendens, and FDC appealed. The proper method for determining damages due to a notice of lis pendens is the difference in value between the fair market value of the property at the time the lis pendens was filed and the fair market value on the date it was terminated together with any consequential damages, including attorney's fees. Here, the 4th DCA noted that the property had actually increased in value and that SFSC was thus not entitled to damages. As to consequential damages, the 4th DCA held that SFSC had to show a diligent yet unsuccessful attempt to resell the property, including proof of a bona fide contract with a ready, willing and able buyer who is thwarted by the lis pendens.

Lis Pendens: where evidence demonstrated likelihood of damages from recorded lis pendens, as well as the amount of potential damages, court

erred in failing to require lis pendens bonds

Empire Ocean Residence Realty, LLC v. CDR Creasnces, S.A.S., 44 So. 3d 179 (Fla. 3d DCA Sept. 1, 2010) (granting motion for clarification). Respondent sued petitioner for fraud, constructive trust, and equitable lien. Respondent recorded notices of lis pendens, not based upon duly recorded instruments, on six properties owned by petitioner. Petitioner moved to dissolve the lis pendens or for a bond, which requests were both denied after an evidentiary hearing. Petitioner appealed, asserting that the trial court erred by denying lis pendens bonds upon proof of potential damages attributable to the lis pendens. The court agreed with petitioner, finding that it had demonstrated it would likely suffer damages from the lis pendens, as well as the amount of potential damages on each property. Thus, the court reversed and remanded for the trial court to set the amount of the lis pendens bonds.

Lis Pendens: statute operates as a nonclaim statute and statute of repose absolutely prohibiting action based on an unrecorded instrument where the holder of that interest fails to intervene within 20 days of recording of notice of lis pendens

Adhin v. First Horizon Home Loans, 44 So. 3d 1245 (Fla. 5th DCA October 1, 2010) (affirming denial of motion to intervene). J&J was the owner and developer of the lots and homes in a subdivision. First Horizon held the first construction mortgage lien on the entire property. When J&J got into financial difficulty, it contracted with Roopnarine, a third party, to sell the lots. Roopnarine sold 13 of the lots but the closing agent gave the closing proceeds to Roopnarine and failed to record the owners' deeds and purchase money mortgages. Although Roopnarine paid \$1,500,000 to First Horizon, First Horizon did not give partial releases from the lien of its mortgage for the individual lots. Instead, it filed a foreclosure action. Fifty-nine days after the fore-



2010-2011 Cases of Interest to Title Insurance Litigators

closure action was filed and notice of lis pendens recorded, the owners and their lenders recorded their deeds and moved to intervene to protect their property rights. The trial court denied the motion to intervene on the ground that the owners and their lenders were the holders of an unrecorded interest in the real property and were beyond the 20 day period allowed for intervention of such interests under Florida's lis pendens statute. The proposed intervenors appealed arguing that the lis pendens statute unconstitutionally conflicts with the Florida Rule of Civil Procedure 1.230, authorizing intervention of an interested party at any time. The 5th DCA disagreed and affirmed. The 5th DCA held that the lis pendens statute, section 48.23, although it has procedural aspects, operates as a substantive nonclaim statute that absolutely prohibits the initiation of litigation after the proscribed period. Unless a claim is filed within the 20 days, "no enforceable right of action against the property exists." It also operates like a statute of repose and bars a cause of action and discharges the unrecorded interest if the holder fails to intervene within 20 days of the lis pendens and the property is later sold at judicial sale. As a result, the 5th DCA held that the lis pendens statute does not violate Article V, section 2(a) of the Florida Constitution. In an interesting footnote, however, the 5th DCA observed that the effect of the statute in this instance might deprive the proposed intervenors' due process rights but did not address the issue as it was not argued on appeal.

Lis Pendens: block billing and vague time entries prevented defendant from establishing attorneys' fees and costs as part of possible damages from lis pendens.

BCJJ, LLC v. Lefevre, 2010 WL 1433403 (M.D. Fla. Mar. 8, 2010) (recommending granting in part defendants' motion to require plaintiffs to post a lis pendens bond). Plaintiff filed and recorded a notice

of lis pendens. Defendant Bayonne filed a motion to require plaintiff to post a lis pendens bond. The magistrate judge recommended granting defendant's motion, however, at a much reduced bond amount compared to plaintiff's request. The court held that defense counsel's block billing and vague time entries prevented Bayonne from segregating the attorneys' fees and costs related to the notice of lis pendens from those associated with the defense of the lawsuit as a whole and the court would not engage in the pick and shovel work necessary to make a more precise determination of reasonableness of the requested fees.

Lis Pendens: evidentiary hearing on motion to dissolve lis pendens was required to determine whether facts established fair nexus between the property and the claim in the lawsuit

Surtain v. Caprio, et al., Case No. 4D10-4776 (Fla. 4th DCA Apr. 6, 2011) (granting petition for certiorari and quashing order dissolving lis pendens). Plaintiff sought rescission of real estate contract, in addition to claims for unjust enrichment and foreclosure of an equitable lien on defendant's land. Plaintiff also recorded a notice of lis pendens. The trial court entered an order granting defendant's motion to dissolve and/or strike plaintiff's notice of lis pendens without an evidentiary hearing, despite plaintiff's request for one. The 4th DCA quashed the order, because unjust enrichment may be the basis for an equitable lien, and "Plaintiff's allegations sufficed to require the trial court to hold an evidentiary hearing to determine whether the facts establish a fair nexus between the property and the claims in the lawsuit."

D. Service of Process

Service of Process: server's failure to note the date



2010-2011 Cases of Interest to Title Insurance Litigators

and time of service on copy of complaint served renders service defective

Vidal v. Suntrust Bank, 41 So. 3d 401 (Fla. 4th DCA August 4, 2010) (reversing order denying motion to quash service of process). Suntrust served Vidal by substitute service. The process server noted the date of service and his initials on the complaint served, but omitted the time of service. Vidal moved to quash arguing that Section 48.031(5) must be strictly complied with and that failure to do so renders service defective. On appeal, the 4th DCA held Section 48.031(5) to be clear and unambiguous and to require the time of service to be written on the complaint even though the server's affidavit filed with the court contained that information. The 4th DCA did not identify any reasons in the statute, case law or corresponding rule for this requirement but gave examples of where it might serve a purpose and thus reversed the order denying the motion to quash.

Service of Process: substitute service on a corporation by leaving copy of process with person in charge of corporation's private mailbox is valid only if no other addresses for corporation are available in the public records

TID Services Inc. v. Dass, 2010 WL 4628571 (Fla. 2d DCA November 17, 2010) (reversing final default judgment). Dass owned a citrus grove together with his sister and her husband. The sister and husband took title in the name of a corporation, TID. When Dass sued TID for partition, damages, conversion, and various other theories arising from the citrus grove property, he effected substitute service by serving the summons and complaint on the owner of the UPS store where TID maintained a private mailbox. The private mailbox was the only address list for TID in its articles of incorporation and annual reports. A default was entered and ultimately final judgment based on the default. TID then moved to vacate arguing that it did not maintain a private

mailbox at the UPS store at the time of service and that Dass had failed to make a search of the public records and showing an alternative address available from the tax collector and property appraiser's offices. The trial court entered an order finding the service valid and denying the motion to vacate. On appeal, the 2d DCA cited to the statute which provides that "[i]f the only address for a person to be served, which is discoverable through public records, is a private mailbox, substitute service may be made by leaving a copy of the process with the person in charge of the private mailbox, but only if the process server determines that the person to be served maintains a mailbox at that location." The 2d DCA identified three elements of this test and held that Dass had not proved that the mail box was the only address for TID discoverable from the public record and reversed the trial court's order denying the motion to vacate the default.

Service of Process: process server's notations on summons contradicting verified return deemed an admission against bank's interest

Bennett v. Christiana Bank & Trust Co., 50 So. 3d 43 (Fla. 3d DCA December 1, 2010) (reversing final judgment of foreclosure). The bank sued Bennett to foreclose a mortgage on her home and filed the process server's verified return of service indicating he had spoken with the defendant about her marital and military status. The bank filed a motion for default and for summary judgment reflecting that Bennett was duly and regularly served. The trial court granted the motion for default and entered summary judgment. Bennett filed a motion to vacate pointing to irregularities with the return and filed an affidavit stating that she had received only a copy of the complaint via mail and had been in the hospital at the time of the alleged service. The trial court entered an order denying the motion noting that although service was questionable Bennett had no



2010-2011 Cases of Interest to Title Insurance Litigators

viable defense to the foreclosure. On appeal, the 3d DCA noted the summons contained notes stating “saw curtains move, read aloud docs, SVP docs at door.” The 3d DCA began its analysis with the return which is entitled to a presumption of validity and is not contradicted by a mere denial. In this case, however, Bennett had more than her affidavit and was able to point to the notes on the summons expressly contradicting the personal service sworn to in the return. The 3d DCA held these notes to be an admission against the bank’s interest. The 3d DCA was even more troubled by the fact that counsel for the bank had simply covered over this conflict by asserting that service was due and regular. Where there is no personal jurisdiction, the 3d DCA also held, there is no requirement to show a meritorious defense on a motion to vacate. The 3d DCA reversed the order denying the motion to vacate and the summary judgment and also called the trial court’s attention to various apparently unreasonable fees and charges.

Service of Process: complaint served must contain process server’s notation of the time of service

Kwong v. Countrywide Home Loans, L.P., 2010 WL 5093282 (Fla. 4th DCA December 15, 2010) (reversing order denying motion to quash). The 4th DCA held that the statutory requirements for service must be strictly complied with, including process server notation of the time of service on the copy of the complaint served, and reversed an order denying a motion to quash service where this requirement was not complied with.

Service of Process: service of process defective due to server’s failure to note, among other things, time of service

Kwong v. Countrywide Home Loans Servicing, L.P., 2011 WL 309581 (Fla. 4th DCA February 2, 2011) (clarifying opinion reversing and remanding denial of motion to quash service of process). Mr. and Mrs.

Kwong appealed a non-final order denying their motion to quash service of process because the process server failed to note, among other things, the time process was served. After reversing and remanding the lower court’s order, the 4th DCA clarified its opinion, noting that “strict compliance with statutory requirements of service is mandated.”

Service of Process: trial court must deem affidavits valid and may not weigh credibility where affidavits may be reconciled and no evidentiary hearing is held

Green v. Jorgensen, 2011 WL 31394 (Fla. 1st DCA January 6, 2011) (reversing order denying motion to quash service). Jorgensen sued Green and filed an unsigned return of service which recited substitute service on Green at her sister’s home in Pennsylvania on December 3, 2008, per section 48.031. The return also showed that server spoke with a woman inside who said, “she does not live here,” and that a neighbor disavowed knowing Green. Green moved to dismiss filing affidavits of her sister and brother-in-law saying Green did not live with them at the time of service and two other affidavits from people in Chicago saying that Green was living in Chicago at the time of service. Jorgensen filed Green’s DMV record as of August 2008 and an arrest report dated November 19, 2008 both showing the Pennsylvania address. After the court denied the motion to dismiss and on rehearing, it directed her to refile the motion as a motion to quash. Green then filed a motion to quash service attaching the prior affidavits and her own affidavit stating she lived Chicago at the time of service. Due to facts in an affidavit Jorgensen submitted suggesting Green may have altered the jurat on her own affidavit, the trial court found Green’s affidavit and that of her brother and sister to lack credibility, declined to quash service, and held Green had failed to meet her burden. On appeal, the 1st DCA held that the burden is on the



2010-2011 Cases of Interest to Title Insurance Litigators

person seeking to invoke jurisdiction. Although when the process server's return is regular on its face it is presumed valid, if the party challenging service makes a prima facie showing the return is defective the burden shifts back to the party attempting to prove substitute service. In this case, the 1st DCA held that both parties' affidavits were not inconsistent, and that, although Jorgensen's evidence showed Green was in Pennsylvania on November 19, 2008, there was no evidence supporting Jorgensen's contention that Green lived in Pennsylvania on the date of service and it was appropriate for the trial court to have weighed the credibility of the affidavits without an evidentiary hearing.

E. Other

Economic Loss Rule: claims by insured of vicarious liability for breach of fiduciary duty, agent's breach of oral contract, and promissory estoppel against title insurer not barred by the economic loss rule

Testa v. Southern Escrow and Title LLC, 36 So. 3d 713 (Fla. 1st DCA April 13, 2010) (reversing in part and affirming in part final judgment dismissing multi-count complaint). Testa brought a 34 count complaint against Southern and Commonwealth based on facts arising out of a title insurance policy coverage dispute. The causes of action included breach of contract, negligence, fraud, breach of fiduciary duty, equitable and promissory estoppel, intentional infliction of emotional distress, FDUTPA, RICO, and even loss of consortium. The trial court held that Testa only had a breach of contract count and that his other claims were barred by the economic loss doctrine. Testa then dismissed his contract count and the trial court entered final judgment dismissing all counts with prejudice. On appeal, the 1st DCA upheld the trial court's decision but, noting it would be very unlikely but not impossible that Testa could

allege ultimate facts in support of these claims, held that three counts: (i) vicarious liability for the agent's breach of fiduciary duty, (ii) breach of oral contract with agent to procure specific coverage, and (iii) promissory estoppel. *Carlton Fields attorneys Mark Brown, Joe Lang and Marty Solomon handled this appeal for Commonwealth.*

Injunction: Florida Supreme Court declines jurisdiction on question over trial court's authority to issue an injunction to freeze assets

Attorney's Title Ins. Fund, Inc. v. M.I. Ind. USA, Inc., 35 So. 3d 872 (Fla. April 22, 2010) Exercising its discretion, the Florida Supreme Court reversed its original acceptance of jurisdiction to review the 4th DCA's opinion as to whether a trial court may issue an injunction to freeze assets of a defendant where the defendant will take action that will render a judgment unenforceable, there is a clear legal right to the relief requested, a substantial likelihood of success, and the injunction will serve the public interest. In the underlying case, the Fund sought an injunction as to an account into which its attorney agent's trust funds could be traced. The 4th DCA denied the injunction and the Fund appealed, but it appears the Florida Supreme Court's opinion on this question will remain a question of its own for the time to come. [NOTE – DID THE SUPREME COURT MAKE A RULING AFTER THIS WAS WRITTEN????]

Bona Fide Purchaser: closing agent's knowledge of prior mortgage is not imputed to a lender where it is contrary to scope of agent's authority

Optimumbank v. Susser, Case No. 50-2009-CA-010597 (Fla. 15th Cir. Ct. August 16, 2010) (order granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment) Ford gave a mortgage to the Sussers as trustees on June 28, 2006. He thereafter gave another mortgage on the same property to Optimumbank.



2010-2011 Cases of Interest to Title Insurance Litigators

The Sussers' mortgage was recorded on July 5, 2006 and Optimumbank's mortgage was recorded on August 1, 2006. The Sussers knew of the mortgage to Optimumbank, but Optimumbank did not know of the mortgage Ford had given to the Sussers. The parties moved for summary judgment. Optimumbank argued that it was a bona fide purchaser for value without notice of the prior the Sussers' mortgage. The Sussers argued that the closing agent knew of their mortgage and that knowledge should be imputed to Optimumbank and, alternatively, that Optimumbank had actual knowledge of their prior mortgage. The issue of whether the agent knew about the mortgage was in dispute and the Sussers argued that this issue should preclude summary judgment. Optimumbank argued that the issue of whether the agent knew of the Sussers' mortgage was in fact a disputed issue but not one of material fact, as an agent's knowledge cannot not be imputed to its principal where the agent acts beyond the scope of its authority in contravention of the principal's authority. Optimumbank showed that everything in the closing file directed the agent to close a first mortgage on the property and thus had the agent done this with knowledge of the Sussers' mortgage, such knowledge could not be imputed to Optimumbank. Judge Sasser agreed with Optimumbank and held that the question of the agent's knowledge of the prior mortgage did not preclude summary judgment. As the Sussers' testimony that Ford's attorney told Optimumbank about the Sussers' mortgage was hearsay, Judge Sasser also held Optimumbank had no actual knowledge of the Sussers' mortgage and was therefore a bona fide purchaser for value without notice of the Sussers' mortgage and entitled to priority.

Insurance: lack of written communications between insurer and insured raised issues of fact about insurer's reconsideration of its coverage determination and retention of counsel to represent insured thus precluding summary judgment

Real Estate Investment Group LLC v. Attorneys' Title Ins. Fund, Inc., 47 So. 3d 868 (Fla. 3d DCA October 13, 2010) (reversing summary judgment). When the insureds began construction on their property they learned that South Florida Water Management District (SFWMD) was the owner of the beneficial interest in an easement that ran across their property and on which they had built a house. The insureds made a claim on their title insurer as the easement was not excepted from coverage and began negotiations with SFWMD to release the easement. The insurer denied the claim. The insureds responded asking for a reconsideration and advising of the negotiations with SFWMD. The insurer failed to respond, but retained an attorney that became involved in the discussions with SFWMD. The insureds continued to negotiate a settlement and notified the insurer of a settlement with a 60 day expiration period. When the insureds failed to accept SFWMD's offer, SFWMD sued them for trespass and ejection. Thereafter, the insureds sued the insurer. The insurer immediately sent six letters to the insured demanding the right to defend the SFWMD action and asserting that the action against the insurer was premature. The insurer also moved for summary judgment on the same theory and the court granted its motion based on the insureds' failure to cooperate. The insureds appealed. The 3d DCA held that there were material issues of fact about whether the insurer had reconsidered its initial denial of coverage, communicated this to the insureds, and whether the attorney it hired had been retained to represent the insureds.

MRTA: restrictions recorded outside of chain of title and not preserved in muniments constituting root of title or by proper notice may be extinguished by the act even though amendments to restrictions are recorded after the root of title

Matissek v. Waller, 51 So. 3d 625 (Fla. 2d DCA January 14, 2011) (reversing final judgment). The



2010-2011 Cases of Interest to Title Insurance Litigators

Matisseks bought property in the Hidden Lakes Estates, a deed restricted airport community. They began building their own aircraft hanger, but Waller, their neighbor, objected that it was a steel hanger and not constructed of masonry as required by the restrictions. He sued to enforce the restrictions and as a defense the Matisseks argued that Florida's Marketable Record Title Act had extinguished the restrictions as to their lot. Hidden Lakes was originally platted in 1971. At that time, the developer had also separately recorded a set of restrictions, including the one requiring hangers to be built out of masonry. The Matisseks traced their root of title back to a 1974 deed which was subject to "all restrictions and easements of record." Although their deed specifically referenced the plat by official book and page, there was no such reference for the restrictions. The developer recorded two amendments to the restrictions in 1977 and both stated that the original restrictions, including the provision at issue, were in full force and effect and would be binding on all future purchasers of the properties within Hidden Lakes. The trial court denied the Matisseks' motion for summary judgment and at trial ruled that MRTA had extinguished the 1971 restrictions but did not extinguish the 1977 amended restrictions because they were recorded after the 1974 root of title. On appeal, the Matisseks argued that the 1977 amendments could not stand alone and that the 1971 restrictions could only have been preserved through the muniments of title under 712.03(1) or by recording proper notice under section 712.03 (2), .05 and .06. The 2d DCA agreed holding that the 1971 restrictions were extinguished and were not properly preserved by the 1974 deed because it failed to identify the restrictions by book and page. The 2d DCA also held that the 1977 amendments did not survive because the amendments "do not concern a chain of title to any property," and are not muniments of title. The 2d DCA thus reversed the trial court's order.

Municipal Liens: municipality lacks authority to grant superpriority to its code enforcement board's liens

City of Palm Bay v. Wells Fargo Bank N.A., 2011 WL 180363 (Fla. 5th DCA January 21, 2011) (affirming summary judgment). Palm Bay's code enforcement ordinance provided that liens created by its code enforcement board and recorded in the public records were "coequal with the liens of all state county district and municipal taxes," and "superior in dignity to all other liens titles and claims until paid." Wells Fargo sued to foreclose a mortgage on property within Palm Bay and named Palm Bay as a defendant based on two code enforcement liens recorded after its mortgage. Palm Bay asserted priority based on its ordinance. The trial court held that legislature did not grant municipalities priority for their code enforcement liens pursuant to Chapter 162 and that the common law principle of first in time, first in right applied to Palm Bay's liens. Palm Bay claimed the authority to adopt such an ordinance granting its liens superpriority pursuant to Article VIII, Section 2(b) of the Florida Constitution, as codified in section 166.021. The 5th DCA noted that section 695.11 codifies the common law principle of first in time, first in right and held that Palm Bay's ordinance conflicts with, and must yield to, that statute.

Relief From Judgment: court lacks jurisdiction to grant motion for relief filed 20 months after quiet title judgment where moving party fails to show the judgment was satisfied by agreement of the parties

Miami-Dade County v. Second Sunrise Invst. Corp., 2011 WL 710185 (Fla. 3d DCA March 2, 2011) (reversing order granting relief from judgment). Second Sunrise purchased property at a tax deed sale subject to \$59,294.38 in County code enforcement liens. Second Sunrise filed a quiet title action and the court granted it but directed the clerk to disburse



2010-2011 Cases of Interest to Title Insurance Litigators

\$22,383.23 in excess proceeds to the County and held that, to the extent the proceeds were insufficient to satisfy the liens, the liens remained on the property. Twenty months after the judgment, Second Sunrise moved for relief, without reference to Rule 1.540, claiming it had reached a compromise of the liens with the county before the final judgment was entered whereby the County would take \$14,276.59 from the registry in satisfaction of the code enforcement liens. The County disputed that it had come to any agreement and that any agreement would have included funds from the registry rather than funds from Second Sunrise. The court granted Second Sunrise's motion requiring that \$3,462 of the tax deed sale proceeds be returned to the registry for payment of the remaining solid waste liens. On appeal, the 3d DCA reversed, found no agreement had been reached such that Rule 1.540(b)(5) would apply, and held that Second Sunrise failed to invoke any basis for conferring jurisdiction for relief from judgment.

Breach of Warranty: measure of damages for partial failure of title of improved land is based on proportionate value, not proportionate area

Allard v. Al-Nayem Int., Inc., 2011 WL 904575 (Fla. 2d DCA March 16, 2011) (denying motion for rehearing en banc and withdrawing November 5, 2010 opinion and substituting this opinion). Al-Nayem purchased commercial property from Allard and sued Allard for breach of warranty deed when it learned that a 30 foot strip of an unimproved portion of the property was owned by the Florida Department of Transportation (FDOT). Al-Nayem argued that, under the Florida Supreme Court's opinion in *Burton v. Price*, damages should be determined as follows: "divide the square footage of the DOT-owned ditch by the total square footage of the property and then multiply that number by the total purchase price." Allard argued that, pursuant to 4th DCA's opinion *Hillsboro Cove., Inc. v. Archibald* and authorities from

other jurisdictions, the damages should be based on the proportionate value of the 30 foot strip, not its proportionate area; otherwise, Al-Nayem would be granted a windfall as a result of the improvements on the property, which were not impaired by the 30 foot strip. At the close of trial, the court granted Mr. Allard's motion for an involuntary dismissal because Al-Nayem failed to present competent, substantial evidence on the correct theory of damages. On appeal, the 2d DCA agreed with Allard and held that "value" in *Burton* requires more than the calculation advanced by Al-Nayem and that dismissal was proper as Al-Nayem offered inadequate proof of the correct measure of damages at trial. The 2d DCA also reversed the trial court's grant of a rehearing, noting that failure to prove damages is an insufficient basis for seeking rehearing. Judge Villanti dissented arguing that Al-Nayem had presented evidence in support of its damages under *Burton*, *Hillsboro* and *Williams*. In addition, Judge Villanti would have certified the following question of great public importance: "Does the measure of damages set forth in *Burton v. Price*, 141 So. 728 (Fla. 1932), apply only to undeveloped property, or is a proper measure of damages for breach of the covenant of seisen concerning developed property the fractional part of the whole consideration paid as the cost at the time of the purchase of the part of the property to which title failed bears to the whole tract purchased?"

Condominium Deposits: \$ 718.202 does not authorize a private cause of action against an escrow agent.

Double AA International Investment Group, Inc. v. Swire Pacific Holdings, Inc., 1:08-cv-23444-CMA (11th Cir. April 4, 2011) (affirming final judgment in part and vacating and remanding in part). Purchaser sued seller and title company who acted as the escrow agent, claiming that the contract for construction and purchase of a condominium was



2010-2011 Cases of Interest to Title Insurance Litigators

voidable because seller and title company failed to establish two separate escrow accounts for purchaser's deposits, as required by Fla. Stat. § 718.202. The district court entered a final judgment in favor of purchaser and against both seller and title company, finding the contract voidable. The 11th Circuit Court of Appeals affirmed the district court's final judgment in favor of purchaser and against seller but vacated and remanded for further proceeding the final judgment in favor of purchaser and against title company. The 11th Circuit Court did not address whether § 718.202 requires the establishment of two escrow accounts; however, it affirmed the district court's holding that even if a separate accounting, rather than a separate account, of the escrowed deposits satisfies § 718.202, seller's accounting practices failed to meet this standard because the transaction log did not separate the buyer's protected 10% deposit from the second 10% deposit that could be withdrawn to pay for construction costs. The court further held that § 718.202 does not authorize a private cause of action against an escrow agent.

Stefanie Lincoln

slincoln@carltonfields.com
www.carltonfields.com/slincoln
813.229.4148

Ilan Nieuchowicz

inieuchowicz@carltonfields.com
www.carltonfields.com/inieuchowicz
305.539.7381

For more information, please contact:

Dana Blunt

dblunt@carltonfields.com
www.carltonfields.com/dblunt
813.229.4156

Christopher Smart

csmart@carltonfields.com
www.carltonfields.com/csmart
813.229.4142