



# Real Property & Title Insurance Case Law Update

Recent Opinions of Interest to  
Real Property Litigators and Practitioners

**Week Ending April 12, 2013**

*By the Carlton Fields Real Property Litigation Practice Group*

For more information about Carlton Fields' Real Property Litigation Practice Group, please visit us at:  
[Real Property Litigation](#)

## CONTENTS

Selection of Case Summaries

- I. Florida State Cases
- II. 11th Circuit Cases
- III. Title Insurance Cases
- IV. The Weekly Update Team

## I. FLORIDA STATE CASES – BRIAN VAVRA

- **Foreclosure:** summary judgment inappropriate where bank failed to refute homeowner's affirmative defense that bank failed to provide notice of acceleration thirty days prior to filing mortgage foreclosure complaint – [Kurian v. Wells Fargo Bank, N.A.](#), No. 4D11-3098 (Fla. 4th DCA April 10, 2013) (reversing final summary judgment of foreclosure) [Ed. Note: motion for rehearing pending; subject mortgage contained no notice requirement]
- **Foreclosure:** trial court erred in dismissing case as sanction for discovery violations because it failed to make express factual findings demonstrating that such a severe sanction was warranted – [Deutsche Bank Nat'l Trust Co. v. Sela](#), No. 4D11-3093 (Fla. 4th DCA April 10, 2013) (reversing dismissal) [Congratulations to Carlton Fields Shareholders Michael Winston and Dean Morande, who represented the appellant in this matter]
- **Restrictive Covenants:** homeowners association cannot enforce restrictive covenants unless it is an assignee of the developer's right to enforce restrictive covenants or is the direct successor of the developer's interest; because developer previously assigned rights to prior association, which never re-assigned rights, developer could not subsequently assign same rights to another association – [Nieto v. Mobile Gardens Assoc. of Florida](#), 2D11-4958 (Fla. 2d DCA April 12, 2013) (reversing final judgment and permanent injunction)
- **Injunctions:** mandatory injunction ordering landlord to restore tenant's possession of premises was unwarranted where (i) it was doubtful parties had a meeting of minds on essential terms of so-called lease, (ii) agreement fell short of requisite certainty for purposes of obtaining mandatory injunction, and (iii) finding of "wrongful" eviction was insufficient to support injunction because the injunction order failed to address whether tenant had an adequate remedy at law – [Blue Earth Solutions v. Florida Consolidated Props., LLC](#), 5D12-1436 (Fla. 5th DCA April 12, 2013) (reversing entry of temporary injunction)
- **Statute of Limitations:** school board's suit for specific performance and breach of

contract, which resulted from settlement agreement requiring landowner to convey parcel to school board by June 15, 2005, was barred by applicable statutes of limitation because (i) prior suit by school board seeking parcel that did not meet the settlement agreement's terms did not toll the statute of limitations and (ii) the last element of school board's cause of action accrued when landowner refused to convey parcel in 2005, and not when school board finally demanded a parcel consistent with the terms of the settlement agreement in 2010 – [Langley Limited P'ship v. Sch. Bd. of Lake Cnty.](#), Florida, No. 5D12-2044 (Fla. 5th DCA April 12, 2013) (finding claims time-barred and reversing final judgment)

## II. 11TH CIRCUIT CASES - LAUREN SEMBLER

- **Property Insurance:** borrowers were third party beneficiaries of lender's force placed insurance policy and thus had standing to enforce policy; borrowers, as owners of property at time of alleged loss, held insurable interest that was not extinguished by subsequent foreclosure that did not discharge borrowers' underlying debt in full – [Conyers v. Balboa Ins. Co.](#), No. 8:12-cv-30-T-33EAJ (M.D.Fla. March 26, 2013) (granting in part and denying in part defendant's motion for summary judgment)

## III. TITLE INSURANCE CASES - CHRIS SMART

- **Escrow Agent:** cause of purchaser's loss was property's commercial zoning classification and agent's revision of purchaser's deed to reflect that property was to be used for commercial, as opposed to residential, purposes did not cause purchaser's loss – [McCulley v. American Land Title Co.](#), Case No. 12-0117 (Mont. April 9, 2013) (affirming in part and reversing in part summary judgment)
- **Statute of Limitations:** under Colorado law, claims accrue when insured knew or should have known of all facts essential to state a claim and claim made beyond the statutory period from date of denial of coverage is barred – [Bank of America, N.A., v. Dakota Homestead Title Ins. Co.](#), Case No. 12-cv-02126 (D. Colo. March 29, 2013) (granting motion to dismiss)
- **Duty to Defend:** because title issues are discrete and may be bifurcated, the "in for one, in for all" insurance rule does not apply and an insurer does not have a duty to defend claims not covered even though they may be inextricably intertwined with and related to the title defect – [GMAC Mortgage LLC v. First American Title Ins. Co.](#), Case No. 11161 (Mass. April 4, 2013) (answering certified questions)
- **Duty to Defend:** insurer does not have duty to defend non-compulsory counterclaims brought against insured in action instituted by insurer to cure defect – [GMAC Mortgage LLC v. First American Title Ins. Co.](#), Case No. 11161 (Mass. April 4, 2013) (answering certified questions)
- **Attorney-Client Privilege:** where outside coverage counsel is also investigating the validity of the underlying title claim and insurer has not established separate files, entire claim file is presumptively discoverable in bad faith action, subject to showing communications relate exclusively to coverage – [Stewart Title Guaranty Co. v. Credit Suisse](#), Case No. 1:11-CV-227 (D. Idaho April 3, 2013) (granting motion to compel in part)
- **Exclusion:** insured's allegations that title agent represented that its title insurance policy was "forward looking" are insufficient as a matter of law to overcome the clear language of post-policy exclusion and, thus, policy did not cover mortgage created and recorded subsequent to issuance of policy – [Moreno v. Wells Fargo Bank, N.A.](#), Case No. A12-1620 (Minn. App. April 8, 2013) (affirming summary judgment)
- **ADA:** dismissing with prejudice claims under the American with Disabilities Act against title insurer as frivolous shotgun pleadings full of vitriolic and scandalous allegations – [Petrano v. Old Republic National Title Ins. Co.](#), Case No. 1:12cv86 (N.D. Fla. March 29, 2013) (adopting report and recommendation, dismissal with prejudice, and entering sanctions)
- **Lis Pendens:** insurer who issued policies while a lis pendens was still pending against insured property, but after plaintiff in underlying action had withdrawn the only claim

against the property owner, was not liable to plaintiff for negligence, aiding and abetting fraud, or unfair trade practices – [Peterson v. Connecticut Attorneys Title Ins. Co.](#), Case No. 34207 (Conn. App. April 16, 2013) (affirming summary judgment)

## THE WEEKLY UPDATE TEAM



Dana Blunt  
[dblunt@carltonfields.com](mailto:dblunt@carltonfields.com)  
813.229.4156  
[bio](#)



Stefanie Lincoln  
[slincoln@carltonfields.com](mailto:slincoln@carltonfields.com)  
813.229.4148  
[bio](#)



Jin Liu  
[jliu@carltonfields.com](mailto:jliu@carltonfields.com)  
813.229.4209  
[bio](#)



Brian B. Vavra  
[bvavra@carltonfields.com](mailto:bvavra@carltonfields.com)  
813.229.4385  
[bio](#)



Ilan Nieuchowicz  
[inieuchowicz@carltonfields.com](mailto:inieuchowicz@carltonfields.com)  
305.539.7381  
[bio](#)



Lauren Sembler  
[lsembler@carltonfields.com](mailto:lsembler@carltonfields.com)  
813.229.4384  
[bio](#)



Chris Smart  
[csmart@carltonfields.com](mailto:csmart@carltonfields.com)  
813.229.4142  
[bio](#)



Sara Witmeyer  
[switmeyer@carltonfields.com](mailto:switmeyer@carltonfields.com)  
813.229.4267  
[bio](#)



Recent opinions of interest to real property litigators and practitioners is provided periodically by the Real Property Litigation Practice Group of Carlton Fields for the attorneys of the firm. Carlton Fields attorneys may pass these updates on to clients and friends of the firm. Any recipient of these updates outside the firm is reminded, however, that they are not intended as legal advice or as a substitute for legal consultation in a particular case or circumstance. Federal statutes require unsolicited e-mails in certain categories to be labeled as advertisements, and to offer the ability to “opt out.” We doubt that this falls within those categories, but regulations have not been adopted, and the situation is ambiguous. If those laws do apply, they require the following disclosure: This communication is an advertisement. If you do not wish to receive such communications from Carlton Fields in the future, either reply to the e-mail address from which you received it, or e-mail [optout@carltonfields.com](mailto:optout@carltonfields.com), and we will not send them to you.

[www.carltonfields.com](http://www.carltonfields.com)

Atlanta • Miami • New York • Orlando • St. Petersburg • Tallahassee • Tampa • West Palm Beach

