



Real Property Case Law Update

Recent Opinions of Interest to
Real Property Litigators and Practitioners

Week Ending June 8, 2012

By the Carlton Fields Real Property Litigation Practice Group

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I. FLORIDA STATE CASES - ILAN NIEUCHOWICZ

- **Foreclosure: Non-party and non-beneficiary of trust lacked standing to challenge trust's standing to bring foreclosure action based upon trust's alleged failure to comply with its pooling and servicing agreement when it took possession of the original note and mortgage** - [Castillo v Deutsche Bank National Trust Co.](#), No. 3D11-2132 (Fla. 3rd DCA June 6, 2012) (affirmed)
- **TILA: a person who originates two or more mortgage loans directly or indirectly through a broker in a twelve month period must comply with the Federal Truth in Lending Act** – [Martinec v Early Bird International, Inc., et al.](#), No. 4D10-3828 (Fla. 4th DCA June 6, 2012) (reversed and remanded)

II. 11TH CIRCUIT CASES – NONE

III. TITLE INSURANCE CASES – CHRIS SMART

- **Tortious Interference: seller's complaint against title insurer for tortious interference based on insurer's alleged failure to insure was properly dismissed** – [Weiss v. Lowenberg](#), Case No. 03366 (N.Y. App. May 1, 2012) (affirming dismissal)
- **Class Action: although VA and FHA loans prohibit certain fees from being charged to the borrower, the parties may nevertheless have a side agreement to increase the purchase price to account for the fees, thus review of files is necessary to determine if escrow agreement was altered by the parties, individual issues predominate, and class certification is inappropriate** – [Perme v. Union Escrow Co.](#), Case No. 97368 and 97381 (Ohio App. May 31, 2012) (reversing judgment granting class certification)
- **Issuing Agent Liability: insurer may be liable for issuing agent's closing even where closing protection letter is not issued based on agent's actual or apparent authority** – [Stout Street Funding Inc. v. Johnson](#), Case No. 10-5634 (E.D. Pa. June 1, 2012) (granting motion to

dismiss in part and denying in part)

- **Claim Valuation: dispute over amount of damages arising from insured's claim based on reservation of mineral rights not excepted from coverage creates issue of material fact precluding summary judgment** – [Boyer v. First American Title Ins. Co.](#), Case No. 4:11-CV-550 (M.D. Pa. May 31, 2012) (granting motion for summary judgment in part and denying in part)
- **Recoupment: insurer's suit against insured for failure to disclose judgment lien was not a SLAPP suit as insured's claim letter was not privileged** – [First American Title Ins. v. Lyons](#), Case No. F062445 (Cal. App. April 17, 2012) (affirming order denying motion to strike fraud and negligent misrepresentation action)
- **Defenses to Coverage: insurer not entitled to defense of offset against insured based on payment to insured by secondary insurer and insured did not breach its duty to cooperate with insurer by entering into settlement agreement with secondary insurer** – [Philadelphia Indemnity Ins. Co. v. Chicago Title Ins. Co.](#), Case No. 09-C-7063 (N.D. Ill. June 2, 2012) (order striking affirmative defenses)

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