



Real Property & Title Insurance Case Law Update

Recent Opinions of Interest to
Real Property Litigators and Practitioners

Week Ending March 22, 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

- **Relation Back:** new cause of action that was different and distinct from that which was originally pled could not, as a matter of law, relate back for purposes of the statute of limitations – [Kopel v. Kopel](#), No. 3D11-536 (Fla. 3d DCA Mar. 20, 2013) (reversing final judgment entered for appellee)
- **Unjust Enrichment:** investment of money in jointly-held corporation was only indirect benefit to individual defendant and, thus, would not support unjust enrichment claim – [Kopel v. Kopel](#), No. 3D11-536 (Fla. 3d DCA Mar. 20, 2013) (reversing final judgment entered for appellee)
- **Supersedeas Bond:** purchaser at foreclosure sale was entitled to interest from supersedeas bond posted by challenger for delay caused by challenger's motion to vacate final judgment of foreclosure pursuant to Fla. R. App. P. 9.310, but not for delay caused by challenger's objections to sale pursuant to F.S. § 45.031(8) – [South Beach Mortg. & Inv. Corp. v. Levine](#), No. 3D11-3207 (Fla. 3d DCA Mar. 20, 2013) (reversing and remanding with instructions)
- **Default Judgment:** final default judgment entered in favor of borrower after bank failed to respond to borrower's breach of contract counterclaim—which declared promissory note to be unenforceable—was void because cancellation is not a proper remedy for breach of contract in the absence of fraud, mistake, undue influence, or other equitable grounds – [Bank of New York Mellon v. Reyes](#), No. 3D12-1900 (Fla. 3d DCA Mar. 20, 2013) (vacating default final judgment and remanding for determination of damages)

II. 11TH CIRCUIT CASES - LAUREN SEMBLER & DANA BLUNT

- **TILA:** creditor and assignee (as defined under 15 USC §§ 1602(g), 1641) may be held vicariously liable for original lender's failure to properly respond to borrower's request for

information under 12 C.F.R. § 226.36 – [Cenat v. U.S. Bank, N.A.](#), No. 12-80663-CIV (S.D.Fla. March 19, 2013) (denying defendant’s motion to dismiss)

- **FDCPA: borrowers could not state a Fair Debt Collection Practices Act claim against loan servicer without alleging they were in default at the time servicer began servicing their loan** – [Brewer v. Bank of America, N.A.](#), Claim No. 6:12-cv-1633-Orl-37GJK (M.D. Fla. Mar. 12, 2013) (granting motion to dismiss)

III. TITLE INSURANCE CASES - CHRIS SMART

- **Recoupment: legal malpractice claim may be assigned under Georgia statute when it involves injury to property in the form of financial loss and is not based on fraud or personal tort** – [Villanueva v. First American Title Ins. Co.](#), Case No. S12G0484 (Ga. Mar. 18, 2013) (affirming appellate court decision that legal malpractice claims are not *per se* unassignable)
- **Escrow: assignee of party to escrow agreement stands in shoes of original party and, thus, is not a stranger to the escrow and may sue escrow agent for breach of escrow agreement** – [Logan v. Chicago Title Ins. Co.](#), Case No. EC050057 (Cal. App. Mar. 15, 2013) (affirming judgment after trial)
- **Exclusions: violations of law existent but unrecorded on date of policy are excluded from coverage** – [First American Title Ins. Co. v. McGonigle](#), Case No. 10-1273 (D. Kan. Mar. 14, 2013) (granting summary judgment)
- **Coverage: recorded yet unenforceable agreement to maintain property is not an encumbrance on title and, thus, is not covered under title insurance policy** – [First American Title Ins. Co. v. McGonigle](#), Case No. 10-1273 (D. Kan. Mar. 14, 2013) (granting summary judgment)

THE WEEKLY UPDATE TEAM



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



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



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



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



Ilan Nieuchoicz
inieuchowicz@carltonfields.com
305.539.7381
[bio](#)



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



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



Sara Witmeyer
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, and we will not send them to you.

www.carltonfields.com

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

Copyright 2012 Carlton Fields, P.A.