



Real Property & Title Insurance Case Law Update

Recent Opinions of Interest to
Real Property Litigators and Practitioners

Week Ending March 8, 2013

By the Carlton Fields Real Property Litigation Practice Group

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I. FLORIDA STATE CASES – SARA WITMEYER

- **Economic Loss Rule:** application of the economic loss rule is limited to products liability cases; receding from prior case law to the extent inconsistent with this holding – [Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Cos.](#), No. SC10-1022 (Fla. Mar. 7, 2013) (answering rephrased certified question) [Note: Justice Pariente wrote a concurring opinion to explain that the majority's conclusion "does nothing to alter" the basic common law principles of contract, e.g., the independent tort doctrine, that already restrict the remedies available to parties who have specifically negotiated for those remedies, irrespective of the economic loss rule]
- **Foreclosure:** trial court erred in dismissing foreclosure complaint for lack of verification where complaint had been verified by loan servicer as attorney in fact for plaintiff pursuant to power of attorney that predated filing of complaint – [Deutsche Bank Nat'l Trust Co. v. Prevratil](#), No. 2D12-2030 (Fla. 2d DCA Mar. 8, 2013) (granting petition for writ of certiorari)
- **Easement:** court erred in finding plaintiffs had right, title, or interest in easement where plaintiffs failed to prove prescriptive right to use or that easement was within the chain of title to their property – [Tift v. San Sebastian Harbor Project, LLC](#), No. 5D11-2471 (Fla. 5th DCA Mar. 8, 2013) (affirming amended final judgment in part, reversing in part)
- **Foreclosure:** plaintiff not entitled to summary judgment of foreclosure where fact issue remained as to whether plaintiff had standing to foreclose at time complaint was filed – [Charley v. Green Tree Servicing, LLC](#), No. 4D11-551 (Fla. 4th DCA Mar. 6, 2013) (reversing final summary judgment)
- **Foreclosure:** summary judgment of foreclosure prematurely granted where lender failed to refute borrower's affirmative defense of unclean hands – [Shahar v. Green Tree Servicing, LLC](#), No. 4D11-1111 (Fla. 4th DCA Mar. 6, 2013) (reversing in part)

II. 11TH CIRCUIT CASES - LAUREN SEMBLER

- **Statutory Implied Warranties:** lender-turned-developer could be liable for breach of statutory implied warranties pursuant to Fla. Stat. § 718.203 even though it had not constructed any relevant part of condominium project; broad definition of “developer” in § 718.106(16) encompasses lenders who have taken title to collateral securing their loans – [The Porto Venezia Condo. Ass’n, Inc. v. WB Fort Lauderdale, LLC](#), No. 0:11-cv-60665-WPD (S.D. Fla. Feb. 27, 2013) (granting plaintiff’s motion for reconsideration)

III. TITLE INSURANCE CASES - CHRIS SMART

- **Duty to Defend:** policy does not insure against any future litigation in connection with the property and the insured’s failure to pay it mortgage does not trigger coverage and does not give rise to a duty to defend or indemnify – [Weinhold v. Chicago Title Ins. Co.](#), Case No. 11-P-1669 (Mass. App. March 4, 2013) (affirming judgment on the pleadings)
- **Escrow Agent: unless plead in the alternative, breach of fiduciary duty and negligence claims are duplicative** – [FDIC v. Chicago Title Ins. Co.](#), Case No. 12-5198 (N.D. Ill. March 4, 2013) (partially granting motion to dismiss)
- **Escrow Agent: claim for negligent supervision must allege employer knew of employee’s unfitness** – [FDIC v. Chicago Title Ins. Co.](#), Case No. 12-5198 (N.D. Ill. March 4, 2013) (partially granting motion to dismiss)
- **Class Action: guarantor of loans insured by title insurance policies and putative class action plaintiff claiming that limitation of liability provision in the ATLA policy is unfair and deceptive lacks standing because his injury was caused by the borrower’s inability to pay the loans and not the alleged antitrust violation** – [Klein v. American Land Title Ass’n](#), Case No. 12-1061 (D.D.C. March 1, 2013) (granting motion to dismiss)
- **Recoupment: title insurer’s claim on claims-made-and-reported professional liability policy may not proceed if it is made outside of the policy’s claim reporting period** – [First American Title Ins. Co. v. Continental Cas. Co.](#), Case No. 12-30336 (5th Cir. Feb. 28, 2013) (affirming summary judgment)
- **Scope of Coverage: there is no continuing coverage where insured quitclaims property and gives no title warranties** – [Fidelity National Title Ins. Co. v. Ruggiri](#), Case No. CV106004033 (Super. Conn. Feb. 4, 2013) (granting motion for summary judgment) (unpublished opinion) [Note: Copy of Opinion Not Publicly Available]
- **Class Action: individualized issues predominated as to proposed class members’ justifiable reliance on title insurance premium listed on HUD-1 settlement statements in putative class action alleging title insurer violated Pennsylvania Unfair Trade Practices and Consumer Protection Law by overcharging for title insurance in connection with mortgage refinancing transactions** – [Cohen v. Chicago Title Ins. Co.](#), No. 06-873 (E.D. Penn. Mar. 7, 2013) (decertifying class and denying summary judgment for plaintiff).

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