



Real Property Case Law Update

Recent Opinions of Interest to
Real Property Litigators and Practitioners

Week Ending November 30, 2012

By the Carlton Fields Real Property Litigation Practice Group

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I. FLORIDA STATE CASES – BRIAN VAVRA

- **Foreclosure: assignee failed to conclusively refute borrower's affirmative defense that they were not given proper notice of default where notice of default sent to borrower did not specify type of default as required by terms of mortgage** - [Judy v. MSMC Venture, LLC](#), No. 2D11-1896 (Fla. 2d DCA Nov. 28, 2012) (reversing final judgment of foreclosure)
- **Foreclosure: court without authority to entertain motion to enforce purported loan modification after final foreclosure judgment; claim that lender orally agreed to modification at post-judgment hearing barred by applicable statute of frauds** – [Vargas v. Deutsche Bank Nat'l Trust Co.](#), No. 3D11-554 (Fla. 3d DCA Nov. 28, 2012) (affirming order adopting report and recommendation)

II. 11TH CIRCUIT CASES - LAUREN SEMBLER

- **Fraudulent Transfer: bank was not absolved of liability for fraudulent transfer of customer's funds where bank added security procedures not permitted by funds transfer agreement between the parties** -- [Chavez v. Mercantil CommerceBank, N.A.](#), Case No. 11-15804 (11th Cir. Nov. 27, 2012) (reversing district court's order granting bank's motion for summary judgment and denying customer's motion for summary judgment)
- **FIRREA: FDIC complied with 12 USC 1821(e)(13)(A), which grants a receiver authority to enforce contracts entered into by a failed bank notwithstanding clauses that purport to terminate contracts on insolvency or receivership, when it assumed and transferred sublease despite termination clause within sublease purporting to terminate on transfer or sale** -- [IberiaBank v. Beneva 41-I, LLC](#), Case No. 11-11195 (11th Cir. Nov. 30, 2012) (affirming district court's order granting defendant's motion for summary judgment)

III. TITLE INSURANCE CASES - CHRIS SMART

- **Economic Loss Rule: a title search is an integral part of a title insurance policy and, as a result, a negligence claim arising out of a title insurance agent's failure to disclose a title defect is barred by the economic loss rule** – [Ziemniak v. Goede & Adamczyk, PLLC](#), Case No.

11-62286 (S.D. Fla. Nov. 19, 2012) (order granting motion to dismiss)

- **Motion to Dismiss: court declined to dismiss negligence claim on the basis of economic loss rule where defendant insurer disclaimed the validity of the policy** – [Sher v. Luxury Mortgage Corp.](#), Case No. 11-3656 (D. Md. Nov. 19, 2012) (denying motions to dismiss cross claim and third party claim)
- **Motion to Dismiss: court declined to dismiss title insurance claim on the basis that lender was not the “insured” under the policy because lender alleged it might be required to repurchase the mortgage loan and thus again become the owner of the indebtedness and an insured under the policy** – [Sher v. Luxury Mortgage Corp.](#), Case No. 11-3656 (D. Md. Nov. 19, 2012) (denying motions to dismiss cross claim and third party claim)

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