



# Real Property Case Law Update

Recent Opinions of Interest to  
Real Property Litigators and Practitioners

**Week Ending November 9, 2012**

*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 Real Property Litigation Case Summaries

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

### I. FLORIDA STATE CASES – SARA WITMEYER

- **Service of Process:** service of process against foreclosure defendants should have been quashed because process server failed to include date and time of service or his identification number on documents served, as required by section 48.031, Florida Statutes – [Walker v. Fifth Third Mortg. Co.](#), No. 5D12-3187 (Fla. 5th DCA Nov. 9, 2012) (reversing order denying motion to quash service of process)
- **Judgment:** trial court erred by not calculating full judgment due, including lodestar amount of attorney's fees and pre-judgment interest on fees – [Genser v. Reef Condo. Ass'n](#), No. 4D12-480 (Fla. 4th DCA Nov. 7, 2012) (reversing final judgment)
- **Post-Judgment Interest:** interest on judgment amount should have been calculated in accordance with section 55.03, Florida Statutes, which provides floating interest rate, not fixed rate – [Genser v. Reef Condo. Ass'n](#), No. 4D12-480 (Fla. 4th DCA Nov. 7, 2012) (reversing final judgment)

### II. 11TH CIRCUIT CASES - LAUREN SEMBLER

- **Federal Housing Finance Agency (FHFA):** the FHFA did not engage in rulemaking when it only directed Fannie Mae and Freddie Mac not to purchase mortgages encumbered by certain first priority lien obligations and did not establish a general set of criteria to be applied across the board; FHFA was acting in its capacity as conservator of Fannie and Freddie and, as such, its actions were not subject to judicial review - [Leon County Florida v. Federal Housing Finance Agency](#), Case No. 11-15614 (11th Cir. Nov. 9, 2012) (affirming dismissal for lack of subject matter jurisdiction)

### III. TITLE INSURANCE CASES - CHRIS SMART

- **Attorney's Fees:** without a contractual or policy provision permitting recovery of attorney's fees, an insured may not recover expenses incurred in bringing action against a title insurer to determine rights under a policy – [Stein, LLC v. Lawyers Title Ins. Corp.](#), Case No. 2011-02264 (N.Y. App. Nov. 7, 2012) (affirming dismissal of part of complaint seeking attorney's fees)
- **Class Action:** certification of class based on common questions relating to application of a mandatory rate and a rejected rate manual is not abuse of discretion – [Stewart Title Guaranty Co. v. Finney](#), Case No. 2011-CA-000499 (Ky. App. Nov. 2, 2012) (affirming certification of class)
- **Third-Party Liability:** a title insurer hired to provide policy purchaser is not, absent evidence of fraud, collusion, or other special circumstances, subject to suit for negligent performance of closing by part owner of the property claiming to have been defrauded – [Shau Chung Hu v. Lowbet Realty Corp.](#), Case No. 22533/11 (N.Y. Sup. Nov. 2, 2012) (denying petition to add title insurer)
- **Malpractice:** lender stated cause of action of legal malpractice against law firm affiliated with title insurer and retained to defend lender's insured interest based on alleged conspiracy to delay coverage determination – [Regions Bank v. KEL Title Ins. Group, Inc.](#), Case No. 3:12cv118 (N.D. Fla. Nov. 1, 2012)
- **Contract:** a policy does not necessarily fail for lack of consideration when the insurer does not receive the premium and there is other consideration applicable – [FDIC v. Commonwealth Land Title Ins. Co.](#), Case No. 1:02CV2390 (N.D. Ohio Sept. 30, 2012) (order granting summary judgment)
- **Contract:** a duty may be imputed to the insurer to notify the insured of that it did not receive a premium and insurer may be estopped from denying existence of policy where it issues a "happy foreclosure letter" to the insured instead – [FDIC v. Commonwealth Land Title Ins. Co.](#), Case No. 1:02CV2390 (N.D. Ohio Sept. 30, 2012) (order granting 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](#)

## CARLTON FIELDS

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

Copyright 2012 Carlton Fields, P.A.