



# Real Property Case Law Update

Recent Opinions of Interest to  
Real Property Litigators and Practitioners

**Week Ending September 28, 2012**

*By the Carlton Fields Real Property Litigation Practice Group*

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## I. FLORIDA STATE CASES - SARA WITMEYER

- **Certiorari:** overbreadth of discovery order is not proper basis for *certiorari* relief – [Bd. of Trs. of Internal Improvement Trust Fund v. Am. Educ. Enters., LLC](#), No. SC10-2251 (Fla. Sept. 27, 2012) (quashing decision of district court of appeal)
- **Discovery:** because purchaser's financial information was relevant in its action against seller of property for negligent misrepresentation, fraud in the inducement, unjust enrichment, and reformation of contract based on seller's failure to include low appraisal in bidding package, and purchaser failed to demonstrate irreparable harm by its disclosure, petition for certiorari relief from discovery order compelling its production should have been denied – [Bd. of Trs. of Internal Improvement Trust Fund v. Am. Educ. Enters., LLC](#), No. SC10-2251 (Fla. Sept. 27, 2012) (quashing decision of district court of appeal)
- **Appellate Review:** time to file appeal is not extended even if rendered order is void *ab initio* – [Nogales v. Countrywide Home Loans, Inc.](#), No. 2D12-2916 (Fla. 2d DCA Sep. 28, 2012) (granting motion for reconsideration to explain dismissal of appeal)
- **Attorneys' Fees:** fee award to defendant who had foreclosure complaint dismissed for failure to give proper notice of intent to foreclose as required by mortgage was proper based on section 57.105(7), Florida Statutes, which provides for reciprocal application of attorney's fees provisions in contracts – [J.P. Morgan Mortgage Acquisition Corp. v. Golden](#), No. 2D11-2997 (Fla. 2d DCA Sept. 28, 2012) (affirming order awarding attorney's fees)
- **Attorneys' Fees:** use of 2.5 multiplier for attorney's fees in foreclosure case was supported by testimony in case regarding foreclosure defendant's inability to pay counsel and mortgage, entry of default against defendant six months prior to time defendant contacted counsel, and rarity of attorneys who would undertake a mortgage foreclosure defense on contingency basis – [J.P. Morgan Mortgage Acquisition Corp. v. Golden](#), No. 2D11-2997 (Fla. 2d DCA Sept. 28, 2012) (affirming order awarding attorney's fees)
- **Restrictive Covenants:** interpretation of public restrictive covenant to eliminate

purchaser's residential development rights of property because deed of sale did not specify number of units purchaser could build on property was erroneous in light of expressed intent of parties to covenant and well-established principles of real property law that favor free and unrestricted use of real property – [19650 NE 18th Ave LLC., v. Presidential Estates Homeowner's Ass'n](#), No. 3D11-2584 (Fla. 3d DCA Sept. 27, 2012) (reversing entry of partial summary judgment)

## II. 11TH CIRCUIT CASES - LAUREN SEMBLER

- **Mortgages:** mortgage on plaintiff's property was not invalidated where broker collected a loan origination fee without a mortgage broker agreement in violation of Fla. Stat. 494.0038; plaintiffs could not rescind their mortgage for broker's failure to sign required TILA disclosures because (1) the mortgage was not secured by plaintiff's principal dwelling, and (2) the action for rescission was not brought within three years of the consummation of the mortgage - [Pounds v. Countrywide Home Loans, Inc.](#), No. 12-60692-CIV (S.D. Fla. Sept. 19, 2012) (order granting defendants' motion to dismiss)
- **Unjust Enrichment:** claim for unjust enrichment fails where the parties do not contest that (1) a valid contract exists between the parties and (2) the dispute arises out their contractual relationship - [William Ryan Homes Florida, Inc. v. Whitney National Bank](#), No. 8:12-cv-1575-T-33TGW (M.D. Fla. Sept. 20, 2012)
- **TILA:** an assignment of mortgage to the servicer in compliance with MERS rules and Freddie Mac's guidelines, but not of the underlying note, does not trigger 15 U.S.C. 1641(g), requiring notice of an assignment or transfer of borrower's debt, because servicer is not the new owner or assignee of the debt - [Foley v. Wells Fargo Bank, N.A.](#), Case No. 11-62314-CIV-DIMITROULEAS/SNOW (S.D. Fla. Sept. 28, 2012) (findings of fact and conclusions of law following bench trial) [*Congratulations to Carlton Fields shareholder, Michael Winston, who represented Wells Fargo Bank in this matter!*]

## III. TITLE INSURANCE CASES - CHRIS SMART

- **Successor Insured:** whether successor lender acquired deed of trust with knowledge of state court quiet title action is a question fact that cannot be resolved on a motion to dismiss – [Howard Investments, LLC v. Fidelity National Title Ins. Co.](#), Case No. 4:12-CV-300 (E.D. Mo. Sept. 19, 2012) (order denying motion to dismiss)
- **Exclusions:** where policy excludes restrictive covenants, such a restriction in a deed in the chain of title is expressly excluded and insurer is not obligated to call that restriction to insured lender's attention – [Metro Bank v. Mississippi Valley Title Ins. Co.](#), Case No. CV-10-RRA-03353-M (N.D. Ala. Sept. 19, 2012) (opinion granting summary judgment)
- **Negligence:** a title search conducted in connection with a commitment is limited to that purpose under Alabama statute and may not serve as basis for claim of negligence against insurer – [Metro Bank v. Mississippi Valley Title Ins. Co.](#), Case No. CV-10-RRA-03353-M (N.D. Ala. Sept. 19, 2012) (opinion granting summary judgment)
- **Arbitration:** requirement of class arbitration may not be presumed from a provision in title insurance policy requiring arbitration between individual insured and insurer and once arbitration is instituted it is arbitrator's duty to determine whether parties agreed on class arbitration subject to court's review – [Chassen v. Fidelity National Financial, Inc.](#), Case No. 09-cv-00291 (D.N.J. Sept. 18, 2012) (order granting motion for reconsideration)
- **Joinder:** adverse claimant to title in underlying state court action is not a required party to insured's action against insurer because court in coverage action may accord complete relief among the existing parties without the presence of the adverse claimant – [Regions Bank v. Commonwealth Land Title Ins. Co.](#), Case No. 11-23257 (S.D. Fla. Aug. 22, 2012)
- **Title Agents:** agent's alleged misrepresentations on HUD-1 settlement statement that purchaser/borrower paid deposit and cash to close connection with mortgage rescue scheme was insufficient to withstand motion for summary judgment where plaintiffs participated in scheme without reading the closing documents and would have signed anything to stay in their home – [Louers v. Lacy](#), Case No. 10-2292 (D. Md. Sept. 20, 2012)

(granting in part and denying in part motion for summary judgment)

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