



# Real Property Case Law Update

Recent Opinions of Interest to  
Real Property Litigators and Practitioners

**Week Ending August 3, 2012**

*By the Carlton Fields Real Property Litigation Practice Group*

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## I. FLORIDA STATE CASES – BRIAN VAVRA

- **Recording Statute (Chapter 695, Fla. Stat.):** constructive notice under Recording Statute attached at time deed and mortgage were recorded despite instruments only appearing in official records for 73 minutes before being removed due to clerk's error; the Recording Statute does not require instruments to remain in official records to impart constructive notice – [Mayfield v. First City Bank of Florida](#), No. 1D11-3681 (1st DCA Aug. 2, 2012) (affirming summary final judgment of foreclosure)
- **Arbitration/Foreclosure:** plain meaning of mortgages' mandatory arbitration clauses required arbitration for foreclosure claims – [MDC 6, LLC v. NRG Investment Partners, LLC](#), No. 2D11-3793 (Fla. 2d DCA Aug. 1, 2012) (reversing trial court in part)
- **Estoppel/Professional liability:** trial court erred in granting summary judgment in favor of property surveyor under any theory of estoppel, as surveyor was not a party to prior lawsuit between property owners regarding setback line and accuracy of survey was not litigated in prior lawsuit – [Zakhary v. Raymond Thompson PSM, Inc.](#), No. 2D11-2145 (Fla. 2d DCA Aug. 1, 2012) (reversing summary judgment for surveyor)
- **Offer of Judgment:** plain and mandatory terms of offer of judgment statute encompass all costs and attorney's fees incurred leading up to final judgment, and thus trial court erred in denying motion for entitlement to recover conditional award of appellate costs and fees – [State Farm Fire and Casualty Co. v. Rembrandt Mobile Diagnostics, Inc.](#), No. 4D12-2169 (Fla. 4th DCA Aug. 1, 2012) (directing trial court to enter order on motion consistent with opinion)

## II. 11<sup>TH</sup> CIRCUIT CASES – LAUREN SEMBLER

- **Damages:** court correctly granted judgment for developer notwithstanding jury verdict for purchaser on fraud claim arising from developer's alleged misrepresentation that condominium unit would have unobstructed view despite new construction next door, where purchaser presented insufficient evidence that unit's actual value (taking into account a soon-to-be-obstructed view) on date of closing was less than the purchase price; although purchaser presented appraisal which valued unit as of the closing at

\$200,000 less than he'd paid, the appraisal did not indicate that it took into consideration the imminent obstruction of unit's view and appraiser did not testify to explain what went into his appraisal – [Soltero v. Swire Dev. Sales, Inc.](#), No. 10-12262 (11th Cir. July 30, 2012) (affirming judgment in favor of defendant)

- **Insurance: insurance contract providing coverage for damages to real property requires that insurer cover not only cost to repair covered real property, but also the diminution in value of said real property as a result of it having been damaged** – [Royal Capital Dev., LLC v. Maryland Cas. Co.](#), No. 10-15716 (11th Cir. August 2, 2012) (reversing district court's grant of summary judgment in favor of defendant and remanding)

### III. TITLE INSURANCE CASES – CHRIS SMART

- **Tort: in Massachusetts, an insurer owes an insured a common law duty and may be held liable in negligence and economic loss rule does not bar claim based on negligence misrepresentation exception** – [MacDonald v. Old Republic National Title Ins. Co.](#), Case No. 11-12075 (D. Mass. July 31, 2012) (order denying motion to dismiss)
- **Rescission: where representations as to amount of loan, source of loan and date funds were disbursed are made to insurer on behalf of insured lender, insurer proved elements of equitable fraud and court did no err in granting summary judgment of rescission** – [Guilford v. First American Title Ins. Co.](#), Case No. A-2445-10T4 (App. N.J. July 26, 2012) (affirming summary judgment)
- **Coverage: UCC-1 fixture filing constitutes a lien against real property and policy does not exclude fixture liens because they with respect to personal property** – [Saul v. Fidelity National Title Ins. Co.](#), Case No. CV-012529-11 (N.Y. Civil Ct. July 18, 2012) (denying motion to dismiss)
- **Duty to Indemnify: insurer's duty to indemnify insured lender arises as of the date of the foreclosure sale when the lender recognizes a loss, not as of the date of the loan, and, if the lender receives the market value of the property or more in settlement of the foreclosure action, the insurer is not obligated to indemnify even if that amount is less than the amount of the loan because the policy does not cover the decline in the value of real property** – [Associated Bank, N.A., v. Stewart Title Guaranty Co.](#), Case No. 11-1124 (D. Minn. July 27, 2012) (granting summary judgment in part and denying in part)

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